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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

Note by the Secretariat

This document contains a compilation of opinions and decisions adopted by the Committee under article 14 of the Convention.

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GE.00-42584 (E)

I. Opinions

A. Communication No. 1/1984

Submitted by:	H.F. Doeleman (counsel)
On behalf of:	A. Yilmaz-Dogan (petitioner)
State party concerned:	The Netherlands
Date of communication:	28 May 1984 (date of initial letter)
Date of decision on admissibility:	19 March 1987

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 10 August 1988,

Having concluded its consideration of communication No. 1/1984, submitted to the Committee by H.F. Doeleman on behalf of A. Yilmaz-Dogan under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it on behalf of Mrs. A. Yilmaz-Dogan and by the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Including in its opinion suggestions and recommendations for transmittal to the State party and to the petitioner under article 14, paragraph 7 (b), of the Convention,

Adopts the following:

Opinion

1. The communication (initial letter dated 28 May 1984, further letters dated 23 October 1984, 5 February 1986 and 14 September 1987) placed before the Committee on the Elimination of Racial Discrimination by H.F. Doeleman, a Netherlands lawyer practising in Amsterdam. He submits the communication on behalf of Mrs. A. Yilmaz-Dogan, a Turkish national residing in the Netherlands, who claims to be the victim of a violation of articles 4 (a), 5 (e) (i) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination by the Netherlands.

2.1 The petitioner states that she had been employed, since 1979, by a firm operating in the textile sector. On 3 April 1981, she was injured in a traffic accident and placed on sick leave.

Allegedly as a result of the accident, she was unable to carry out her work for a long time; it was not until 1982 that she resumed part-time duty of her own accord. Meanwhile, in August 1981, she married Mr. Yilmaz.

2.2 By a letter dated 22 June 1982, her employer requested permission from the District Labour Exchange in Apeldoorn to terminate her contract. Mrs. Yilmaz was pregnant at that time. On 14 July 1982, the Director of the Labour Exchange refused to terminate the contract on the basis of article 1639h (4) of the Civil Code, which stipulates that employment contracts may not be terminated during the pregnancy of the employee. He pointed, however, to the possibility of submitting a request to the competent Cantonal Court. On 19 July 1982, the employer addressed the request for termination of the contract to the Cantonal Court in Apeldoorn. The request included the following passage: [...]

> "When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest setback disappear on sick leave under the terms of the Sickness Act. They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on."

After hearing the request on 10 August and 15 September 1982, the Cantonal Court agreed, by a decision of 29 September 1982, to terminate the employment contract with effect from 1 December 1982. Article 1639w (former numbering) of the Civil Code excludes the possibility of an appeal against a decision of the Cantonal Court.

2.3 On 21 October 1982, Mrs. Yilmaz requested the Prosecutor at the Supreme Court to seek annulment of the decision of the Cantonal Court in the interest of the law. By a letter of 26 October, she was informed that the Prosecutor saw no justification for proceeding in that way. Convinced that the employer's observations of 19 July 1982 constituted offences under the Netherlands Penal Code, Mrs. Yilmaz, on 21 October 1982, requested the Prosecutor at the District Court at Zutphen to prosecute her employer. On 16 February 1983, the Prosecutor replied that he did not consider the initiation of penal proceedings to be opportune. The petitioner further applied to the Minister of Justice, asking him to order the Prosecutor at Zutphen to initiate such proceedings. The Minister, however, replied on 9 June 1983 that he saw no reason to intervene, since recourse had not yet been had to the complaint procedure pursuant to article 12 of the Code of Penal Procedure, which provided for the possibility of submitting a request to the Court of Appeal to order prosecution of a criminal offence. In conformity with the Minister's advice, Mrs. Yilmaz, on 13 July 1983, requested the Court of Appeal at Arnhem, under article 12 of the Code of Penal Procedure, to order the prosecution of her employer. On 30 November 1983, the Court of Appeal rejected the petition, stating, inter alia, that it could not be determined that the defendant, by raising the issue of differences in absenteeism owing to childbirth and illness between foreign and Netherlands women workers, intended to discriminate by race, or that his actions resulted in race discrimination. While dismissing the employer's remarks in the letter of 19 July 1982 as "unfortunate and objectionable", the Court considered "that the institution of criminal proceedings [was] not in the public interest or in the interest of the petitioner". The Court's decision taken pursuant to article 12 of the Code of Penal Procedure cannot be appealed before the Supreme Court.

2.4 Petitioner's counsel concludes that the Netherlands violated article 5 (e) (i) of the Convention, because the alleged victim was not guaranteed the right to gainful work and protection against unemployment, which is said to be reflected in the fact that both the Director of the Labour Exchange and the Cantonal Court endorsed the termination of her employment contract on the basis of reasons which must be considered as racially discriminatory. Secondly, he claims that the Netherlands violated article 6 of the Convention since it failed to provide adequate protection as well as legal remedies because Mrs. Yilmaz was unable to have the discriminatory termination of her contract reviewed by a higher court. Thirdly, it is alleged that the Netherlands violated article 4 of the Convention because it did not order the Prosecutor to proceed against the employer on the basis of either article 429 quarter or article 137c to article 137e of the Netherlands Penal Code, provisions incorporated in that Code in the light of the undertaking, under article 4 of the Convention, to take action to eliminate manifestations of racial discrimination. Finally, it is argued that article 6 of the Convention was violated because the State party denied the petitioner due process by virtue of article 12 of the Code of Penal Procedure, when she unsuccessfully petitioned for penal prosecution of the discrimination of which she claims to have been the victim.

3. At its thirty-first session in March 1985, the Committee on the Elimination of Racial Discrimination decided to transmit the communication, under rule 92, paragraphs 1 and 3, of its rules of procedure, to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 By submissions dated 17 June and 19 November 1985, the State party objects to the admissibility of the communication. It affirms that the Committee is entitled, under its rules of procedure, to examine whether a prima facie consideration of the facts and the relevant legislation reveals that the communication is incompatible with the Convention. For the reasons set out below, it considers the communication to be incompatible ratione materiae with the Convention and therefore inadmissible.

4.2 The State party denies that either the Director of the Labour Exchange or the Cantonal Court in Apeldoorn violated any of the rights guaranteed by article 5 (e) (i) of the Convention and argues that it met its obligation under that provision to guarantee equality before the law in the enjoyment of the right to employment by providing non-discriminatory remedies. With respect to the content of the letter of Mrs. Yilmaz's employer dated 19 July 1982, the State party points out that the decision of the Cantonal Court does not, in any way, justify the conclusion that the court accepted the reasons put forth by the employer. In reaching its decision to dissolve the contract between the petitioner and her employer, the Court merely considered the case in the light of the relevant rules of civil law and civil procedure; it refrained from referring to the petitioner's national or ethnic origin.

4.3 With respect to the petitioner's argument that the State party should have provided for a more adequate mechanism of judicial review and appeal against Cantonal Court judgements related to the termination of employment contracts, the State party points out that the relevant domestic procedures, which were followed in the present case, provide adequate protection and legal remedies within the meaning of article 6 of the Convention. Article 6 does not include an obligation for States parties to institute appeal or other review mechanisms against judgements of the competent judicial authority.

4.4 With respect to the allegation that the State party violated articles 4 and 6 of the Convention by failing to order the Prosecutor to prosecute the employer, the State party argues that the obligation arising from article 4 of the Convention was met by incorporating in the Penal Code articles 137c to e and articles 429 ter and quarter and penalizing any of the actions referred to in these provisions. Article 4 cannot be read as obligating States parties to institute criminal proceedings under all circumstances with respect to actions which appear to be covered by the terms of the article. Concerning the alleged violation of article 6, it is indicated that there is a remedy against a decision not to prosecute: the procedure pursuant to article 12 of the Code of Criminal Procedure. The State party recalls that the petitioner indeed availed herself of this remedy, although the Court of Appeal did not find in her favour. It further observes that the assessment made by the Court of Appeal before deciding to dismiss her petition was a thorough one. Thus, the discretion of the court was not confined to determining whether the Prosecutor's decision not to institute criminal proceedings against the employer was a justifiable one; it was also able to weigh the fact that it is the Minister of Justice's policy to ensure that criminal proceedings are brought in as many cases as possible where racial discrimination appears to be at issue.

5.1 Commenting on the State party's submission, petitioner's counsel, in a submission dated 5 February 1986, denies that the communication should be declared inadmissible as incompatible ratione materiae with the provisions of the Convention and maintains that his allegations are well founded.

5.2 In substantiation of his initial claim, it is argued, in particular, that the Netherlands did not meet its obligations under the Convention by merely incorporating into its Penal Code provisions such as articles 137c to e and 429 ter and quarter. He affirms that, by ratifying the Convention, the State party curtailed its freedom of action. In his opinion, this means that a State cannot simply invoke the expediency principle which, under domestic law, leaves it free to prosecute or not; rather, it requires the Netherlands actively to prosecute offenders against sections 137c and e and 429 ter and quarter unless there are grave objections to doing so.

5.3 Furthermore, petitioner's counsel maintains that in the decision of the Court of Appeal of 30 November 1983, the causal relationship between the alleged victim's dismissal and the different rate of absenteeism among foreign and Netherlands women workers, as alleged by the employer, is clear. On the basis of the Convention, it is argued, the Court should have dissociated itself from the discriminatory reasons for termination of the employment contract put forth by the employer.

6. On 19 March 1987, the Committee, noting that the State party's observations concerning the admissibility of the communication essentially concerned the interpretation of the meaning and scope of the provisions of the Convention and having further ascertained that the communication met the admissibility criteria set out in article 14 of the Convention, declared the communication admissible. It further requested the State party to inform the Committee as early as possible, should it not intend to make a further submission on the merits, so as to allow it to deal expeditiously with the matter.

7. In a further submission dated 7 July 1987, the State party maintains that no violation of the Convention can be deemed to have taken place in the case of Mrs. Yilmaz. It argues that the

alleged victim's claim that, in cases involving alleged racial discrimination, the weighing by the judge of the parties' submissions has to meet especially severe criteria, rests on personal convictions rather than legal requirements. The requirement in civil law disputes are simply that the judge has to pronounce himself on the parties' submissions inasmuch as they are relevant to the dispute. The State party further refutes the allegation that the terms of the Convention require the establishment of appeal procedures. In this respect, it emphasizes that criminal law, by its nature, is mainly concerned with the protection of the public interest. Article 12 of the Code of Criminal Procedure gives individuals who have a legitimate interest in prosecution of an offence the right to lodge a complaint with the Court of Appeal against the failure of the authorities to prosecute. This procedure guarantees the proper administration of criminal law, but it does not offer the victims an enforceable right to see alleged offenders prosecuted. This, however, cannot be said to constitute a violation of the Convention.

8.1 Commenting on the State party's submission, petitioner's counsel, in a submission dated 14 September 1987, reiterates that the State party violated article 5 (e) (i) in that the cantonal judge failed to protect the petitioner against unemployment, although the request for her dismissal was, allegedly, based on racially discriminatory grounds. He asserts that, even if the correspondence between the Director of the Labour Exchange and the employer did not refer to the national or ethnic origin of the alleged victim, her own family name and that of her husband must have made it clear to all the authorities involved that she was of Turkish origin.

8.2 With respect to the State party's argument that its legislation provides for adequate protection - procedural and substantive - in cases of alleged racial discrimination, it is claimed that domestic law cannot serve as a guideline in this matter. The expediency principle, i.e. the freedom to prosecute, as laid down in Netherlands law, has to be applied in the light of the provisions of the Convention with regard to legal protection in cases of alleged racial discrimination.

9.1 The Committee on the Elimination of Racial Discrimination has considered the present communication in the light of all the information made available to it by the parties, as required under article 14, paragraph 7 (a), of the Convention and rule 95 of its rules of procedure, and bases its opinion on the following considerations.

9.2 The main issues before the Committee are (a) whether the State party failed to meet its obligation, under article 5 (e) (i), to guarantee equality before the law in respect of the right to work and protection against unemployment, and (b) whether articles 4 and 6 impose on States parties an obligation to initiate criminal proceedings in cases of alleged racial discrimination and to provide for an appeal mechanism in cases of such discrimination.

9.3 With respect to the alleged violation of article 5 (e) (i), the Committee notes that the final decision as to the dismissal of the petitioner was the decision of the Sub-District Court of 29 September 1982, which was based on article 1639w (2) of the Netherlands Civil Code. The Committee notes that this decision does not address the alleged discrimination in the employer's letter of 19 July 1982, which requested the termination of the petitioner's employment contract. After careful examination, the Committee considers that the petitioner's dismissal was the result of a failure to take into account all the circumstances of the case. Consequently, her right to work under article 5 (e) (i) was not protected.

9.4 Concerning the alleged violation of articles 4 and 6, the Committee has noted the petitioner's claim that these provisions require the State party actively to prosecute cases of alleged racial discrimination and to provide victims of such discrimination with the opportunity of judicial review of a judgement in their case. The Committee observes that the freedom to prosecute criminal offences - commonly known as the expediency principle - is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the raison d'être of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination, in the light of the guarantees laid down in the Convention. In the case of Mrs. Yilmaz-Dogan, the Committee concludes that the prosecutor acted in accordance with these criteria. Furthermore, the State party has shown that the application of the expediency principle is subject to, and has indeed in the present case been subjected to, judicial review, since a decision not to prosecute may be, and was reviewed in this case, by the Court of Appeal, pursuant to article 12 of the Netherlands Code of Criminal Procedure. In the Committee's opinion, this mechanism of judicial review is compatible with article 4 of the Convention; contrary to the petitioner's affirmation, it does not render meaningless the protection afforded by sections 137c to e and 429 ter and quarter of the Netherlands Penal Code. Concerning the petitioner's inability to have the Sub-District Court's decision pronouncing the termination of her employment contract reviewed by a higher tribunal, the Committee observes that the terms of article 6 do not impose upon States parties the duty to institute a mechanism of sequential remedies, up to and including the Supreme Court level, in cases of alleged racial discrimination.

10. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7, of the Convention, is of the opinion that the information as submitted by the parties sustains the claim that the petitioner was not afforded protection in respect of her right to work. The Committee suggests that the State party take this into account and recommends that it ascertain whether Mrs. Yilmaz-Dogan is now gainfully employed and, if not, that it use its good offices to secure alternative employment for her and/or to provide her with such other relief as may be considered equitable.

B. Communication No. 2/1989

Submitted by:	G.A.C. Enkelaar (counsel)
On behalf of:	Demba Talibe Diop (petitioner)
State party concerned:	France
Date of communication:	15 March 1989 (date of initial letter)
Date of decision on admissibility:	22 August 1990

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 18 March 1991,

Having concluded its consideration of communication No. 2/1989, submitted to the Committee by G.A.C. Enkelaar on behalf of D.T. Diop under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it on behalf of Mr. Diop and by the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1. The author of the communication (initial submission dated 15 March 1989 and subsequent correspondence) is Demba Talibe DIOP, a Senegalese citizen born in 1950, currently residing in Monaco. He claims to be the victim of a violation by France of article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel, who has provided a copy of his power of attorney.

The facts as submitted

2.1 The author, who is married to a French citizen and has one child, has been domiciled in Monaco since December 1985. From July 1982 to December 1985, he practised law in Dakar. On 30 January 1986, the author formally applied for membership in the Bar of Nice, submitting all the documentary evidence required. On 5 May 1986, the Bar Council of Nice rejected his application; on 8 May 1986, the competent authorities in Nice delivered his resident's permit (visa d'établissement). On 30 May 1986, Mr. Diop appealed the decision of the Bar Council to

the Court of Appeal of Aix-en-Province. By judgement of 27 October 1986, the Court of Appeal dismissed the appeal; a subsequent appeal to the Court of Cassation was dismissed on 4 October 1988.

2.2 The decision of the Bar Council of Nice was based on the fact that Mr. Diop did not hold the Certificate of Aptitude for the Exercise of the Legal Profession (CAPA), as required by article 11 of Act No. 71.1130 of 31 December 1971; the Court of Appeal upheld the decision on the same grounds. The Court of Cassation, however, found that the Court of Appeal had erroneously interpreted the text on waiver of the CAPA requirement, and that it had "substituted purely juridical considerations for those that were justifiably criticized in the first of the grounds of appeal". The Court of Cassation found that the author met all the statutory requirements for the exercise of the lawyers' profession except one: the French nationality. The author points out that the Bar Council of Nice had not referred to his Senegalese nationality as an obstacle to his exercising the legal profession in France.

2.3 Article 11, paragraph 1, of Act No. 71.1130 of 31 December 1971 stipulates that "no one may enter the legal profession if he is not French, except as provided for in international Conventions". The author argues that his case falls within the scope of application of the Franco-Senegalese Convention on Establishment (Convention d'établissement franco-sénégalaise) of 29 March 1974, article 1 of which prohibits discrimination between French and Senegalese citizens in the enjoyment of civil liberties to which they are entitled on the same terms (including the right to work, set forth in the preamble of the French Constitution of 4 October 1958). In the light of this provision, according to the author, the Court of Cassation should not have considered Senegalese citizenship as an impediment to the exercise of the legal profession in France. He further indicates that the legal profession does not fall within the occupational categories to which the restrictions of article 5 of the Convention apply, and no other Convention provision expressly prohibits the free exercise of the legal profession.

2.4 Article 9 of the Franco-Senegalese Convention on Movement of Persons (Convention franco-sénégalaise relative à la circulation des personnes) of 29 March 1974 stipulates that "French nationals wishing to establish themselves in Senegal and Senagalese nationals wishing to establish themselves in France for the purpose of engaging in self-employed activities, or without engaging in any gainful occupation, must ... produce the required evidence of the means of subsistence available to them" (emphasis added). The author states that the legal profession is considered in France to be the epitome of self-employed activity; this is confirmed by article 7, paragraph 1, of Act No.71.1130.

2.5 Article 23 of the Franco-Senegalese Tax Convention (Convention fiscale franco-sénégalaise) of 29 March 1974 provides that "[T]he income that a person domiciled in a Contracting State draws from a liberal profession or similar independent activity shall be subject to tax in that State alone, unless that person is regularly possessed of a fixed base for the exercise of his profession in the other Contracting State ... For the purposes of the present article, scientific, artistic, literary, educational and pedagogical activities, inter alia, as well as the activities of doctors, advocates, architects and engineers, are considered liberal professions" (emphasis added).

2.6 The author further notes that, on 12 February 1990, he requested that his name be added to the list of legal counsel (conseils juridiques), as French nationality is no prerequisite for the practice as legal counsel. By letter dated 24 April 1990, he was informed that his inscription was imminent. On 26 June 1990, however, he was told that his request could not be complied with, as he had not demonstrated that he had fulfilled the requirement of a three-year apprenticeship (stage); the author affirms that his application had been complete and included, in particular, proof of such an apprenticeship.

The complaint

3.1 The author considers that he was denied the right to work on the ground of national origin, and alleges that the French judicial authorities violated the principle of equality, enshrined in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Allegedly, his right to equal treatment before the tribunals was violated in two respects. First, whereas he was denied to practice law in Nice, six lawyers of Senegalese nationality are members of the Paris Bar. According to the author, his application would have been granted had he submitted it in Paris; he considers it unacceptable that the State party should allow such differences within the national territory. Secondly, it is submitted that the principle of equality and reciprocity at the international level is also affected by virtue of the fact that on the basis of the above-mentioned bilateral instruments, all French lawyers have the right to exercise their profession in Senegal and vice versa.

3.2 Distinctions, exclusions, restrictions or preferences established in the application of the International Convention on the Elimination of All Forms of Racial Discrimination must be spelled out in legislative provisions which, the author claims, do not exist in his case. Such distinctions would contravene article 34 of the French Constitution. Furthermore, even if there were pertinent domestic legislation, the bilateral Franco-Senegalese Conventions of 29 March 1974 prevail over domestic legislation and authorize French and Senegalese citizens to exercise a liberal profession, including the legal one, on the territory of the State of which they do not have the citizenship.

3.3 The author claims that existing Senegalese legislation (Law on the Exercise of the Legal Profession of 1984) does not prohibit legal practice by French citizens in Senegal. In this context, he notes that on 8 January 1985, Ms. Geneviève Lenoble, a French citizen and member of the Paris Bar, was admitted to the Bar of Senegal; so was, on 7 January 1987, another French citizen, Ms. Dominique Picard. On the other hand, the Governing Body of the Bar Council of Nice required, for Mr. Diop's inscription on the roll, the Certificate of Aptitude for the Exercise of the Legal Profession (CAPA), although article 44 of the decree of 9 June 1972, concerning the application of article 11, paragraph 3, of the Law of 31 December 1971 stipulates that this Certificate is not necessary for individuals who already are qualified to practice law in a country with which France concluded an agreement of judicial cooperation.

3.4 It is submitted that the State party violated the author's right to a family life because, in the light of the impossibility to practise law in Nice, the author was forced to temporarily leave his home and take up residence and practise law in Dakar, so as to be able to provide for his family.

3.5 The author claims that the decision of the Bar Council of Nice of 5 May 1986, confirmed by the Court of Appeal on 27 October 1986, is irreconcilable with the judgement of the Court of Cassation of 4 October 1988. The Court of Cassation did not annul the decision of the Bar Council as contrary to the law in criticizing its motivation; it simply substituted its own motives in dismissing the appeal. In the author's opinion, the irreconcilability of the judicial decisions in the case is equivalent, in law, to a refusal to adjudicate his request for admission to the bar altogether, thus denying him an effective remedy before domestic courts. In this way, it is submitted, he was denied the exercise of a fundamental public freedom, that is, his right to work in France.

The State party's observations

4.1 The State party contends that the author has failed to raise, before the domestic courts, the issue of discriminatory treatment of which he claims to have been the victim; accordingly, his communication should be declared inadmissible because of non-exhaustion of domestic remedies, under article 14, paragraph 7 (a), of the Convention.

4.2 The State party further observes that the communication is inadmissible as incompatible with the provisions of the Convention in accordance with article 1, paragraph 2, which stipulates that the "Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens". In Mr. Diop's case, the rejection of his application by the Bar Council of Nice was exclusively based on his nationality, not because he was Senegalese but because he was not French within the meaning of article 1, paragraph 2. The State party adds that the ratio legis of article 11, paragraph 1, of Act No. 71.1130 of 31 December 1971 is to protect French lawyers from foreign competition. In so doing, France exercises her sovereign prerogatives expressly recognized by article 1, paragraph 2, of the Convention.

4.3 With respect to the contention that the author meets all the requirements for the exercise of the legal profession in France, the State party claims that, for the Court of Cassation, the fact that the author was not of French nationality was in itself sufficient to dismiss the appeal, thus making it superfluous to consider whether other conditions for the exercise of the legal profession in France had or had not been met. The State party endorses the interpretation of article 1 of the Franco-Senegalese Convention on Establishment by the Court of Cassation, according to which this provision merely concerns the enjoyment of civil liberties and cannot be construed as encompassing a right to exercise the legal profession. For the State party, the author's argument that the right to work is a civil liberty and that, since the legal profession is gainful occupation it is a civil liberty, is a mere "sophism" and must be rejected.

4.4 The State party further explains the organization and the functions of the system of Bar Councils attached to each regional court (Tribunal de Grande Instance). These Bar Councils are administered by a Governing Board (Conseil de l'Ordre), enjoy legal personality and operate independently of one another. It is the duty of the Governing Board of each Bar Council to decide on applications for admission to the Bar; decisions on such matters by the Board may only be appealed by the applicant and the Public Prosecutor (Procureur Général) of the

competent Court of Appeal, within two months of the notification of the decision. The State party adds that each Governing Body decides independently on applications for admission to the Bar and may, in the process, err in its interpretation of applicable legal provisions.

4.5 Inasmuch as the admission of six Senegalese lawyers to the Bar of Paris is concerned, the State party submits that the Governing Body of the Bar of Paris erroneously interpreted applicable regulations by admitting these Senegalese citizens. The State party affirms that this situation does not create any rights for the author, nor a legal basis on which the inscription of every Senegalese lawyer on the Bar Roll could be justified, as any such act would violate the applicable rules and regulations. Furthermore, these lawyers were admitted prior to the Court of Cassation's judgement in the author's case; if this jurisprudence were to be invoked before the ordinary tribunals, it is likely, according to the State party, that these lawyers would have to be stripped of membership.

4.6 With respect to the treatment of French lawyers by the Senegalese judicial authorities, the State party explains that article 16 of a Senegalese Law on the Exercise of the Legal Profession of 1984 stipulates that no one may be admitted to the Bar in Senegal if he is not Senegalese or the citizen of a State that grants reciprocity. In application of this provision, the Bar Council of Dakar rejected, on 14 March 1988, the application of a French lawyer admitted to the Bar of Senegal on a probationary basis in 1984. The decision of the Bar Council of Dakar was based on the fact that the applicant was not Senegalese and that no international Convention or other applicable provision provided for reciprocity in the matter. The Court of Appeal of Dakar confirmed this decision by judgement of 15 April 1989. During the appeal proceedings, it was submitted on behalf of the Bar Council that the Franco-Senegalese Convention on Establishment of 1974 did not provide for reciprocity with respect to liberal professions. In his pleadings, the Public Prosecutor, who had himself participated in the elaboration of the 1974 Convention, contended that the omission of liberal professions had been deliberate; the State party notes that one of the Convention's aims purportedly was to forestall the admission of French lawyers to the Bar of Senegal. The State party concludes that Mr. Diop's situation in France is similar to that of French lawyers wishing to practice in Senegal and that, accordingly, the principle of equality of treatment and of reciprocity invoked by him may be applied to his disadvantage.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, determine whether or not it is admissible under the International Convention on the Elimination of All Forms of Racial Discrimination.

5.2 The Committee took note of the State party's observation that the communication was inadmissible on the ground of non-exhaustion of domestic remedies, since the author had not invoked discriminatory treatment based on national origin before the domestic courts. The committee noted, however, that on the basis of the information before it, the issue of the author's national origin was first addressed by the court of last instance, the Court of Cassation, in its decision of 4 October 1988. Furthermore, the State party had not indicated the availability of

any other remedies to the author. In the circumstances, the Committee concluded that the requirements of article 14, paragraph 7 (a), of the Convention and of rule 91 (e) of the Committee's rules of procedure, had been met.

5.3 In respect of the State party's observation "that the communication should be declared inadmissible as not falling within the scope of the Convention in the light of article 1, paragraph 2", the Committee observed that the question of the application of this article was one of substance which should be examined at a later stage, in conformity with rule 95 of the rules of procedure. The Committee further observed that rule 91 (c) of the rules of procedure enjoined it to ascertain whether any communication is compatible with the provisions of the Convention, and that "compatibility" within the meaning of rule 91 (c) must be understood in procedural, not substantive, terms. In the Committee's opinion, the communication did not suffer from procedural incompatibility.

5.4 On 22 August 1990, therefore, the Committee on the Elimination of Racial Discrimination declared the communication admissible.

6.1 The Committee on the Elimination of Racial Discrimination has examined the present communication in the light of all the information made available by the parties, as provided for in rule 95, paragraph 1, of its rules of procedure.

6.2 The Committee has noted the author's claims (a) that he was discriminated against on one of the grounds defined in article 1, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination, (b) that the rejection of his application for admission to the Bar of Nice constituted a violation of his right to work (article 5 (e) of the Convention) and his right to a family life, and (c) that the rejection of his application violated the Franco-Senegalese Convention on Movement of Persons. After careful examination of the material placed before it, the Committee bases its decision on the following considerations.

6.3 In respect of the alleged violations of the Franco-Senegalese Convention on Freedom of Movement of 29 March 1974, the Committee observes that it is not within its mandate to interpret or monitor the application of bilateral conventions concluded between States parties to the Convention, unless it can be ascertained that the application of these conventions result in manifestly discriminatory or arbitrary treatment of individuals under the jurisdiction of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, which have made the declaration under article 14. The Committee has no evidence that the application or non-application of the Franco-Senegalese Conventions of March 1974 has resulted in manifest discrimination.

6.4 As to the alleged violation of article 5 (e) of the Convention and of the right to a family life, the Committee notes that the rights protected by article 5 (e) are of programmatic character, subject to progressive implementation. It is not within the Committee's mandate to see to it that these rights are established; rather, it is the Committee's task to monitor the implementation of these rights, once they have been granted on equal terms. Insofar as the author's complaint is based on article 5 (e) of the Convention, the Committee considers it to be ill-founded.

6.5 Finally, inasmuch as the allegation of racial discrimination within the meaning of article 1, paragraph 1, of the Convention is concerned, the Committee notes that article 11, paragraph 1, of the French Act No. 71.1130 of 31 December 1971 stipulates that no one may accede to the legal profession if he is not French, except as provided for in international conventions.

6.6 This provision operates as a preference or distinction between citizens and non-citizens within the meaning of article 1, paragraph 2, of the Convention: the refusal to admit Mr. Diop to the Bar was based on the fact that he was not of French nationality, not on any of the grounds enumerated in article 1, paragraph 1. The author's allegation relates to a situation in which the right to practice law exists only for French nationals, not to a situation in which this right has been granted in principle and may be generally invoked; accordingly, the Committee concludes that article 1, paragraph 1, has not been violated.

7. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of any of the provisions of the Convention.

C. Communication No. 3/1991

Submitted by: Michel L.N. Narrainen
[represented by counsel]

State party concerned: Norway

Date of Communication: 15 August 1991 (date of initial letter)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 15 March 1994,

Having concluded its consideration of communication No. 3/1991, submitted to the Committee by Michel L.N. Narrainen under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it on behalf of Michel L.N. Narrainen and by the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1. The author of the communication (initial submission dated 15 August 1991) is Michel L.N. Narrainen, a Norwegian citizen born in 1942, currently detained in a penitentiary in Oslo. He claims to be a victim of violations by Norway of his rights under the International Convention on the Elimination of All Forms of Racial Discrimination, but does not invoke specific provisions of the Convention.

The facts as found by the Committee

2.1 The author is of Tamil origin and was born in Mauritius; in 1972, he was naturalized and became a Norwegian citizen. On 25 January 1990, he was arrested in connection with a drug-related offence. On 8 February 1991, before the Eidsivating High Court (Court of Appeal - "Lagmannsretten"), a jury of 10 found him guilty of offences against section 162 of the Criminal Code (drug trafficking), and the author was sentenced to six and a half years of imprisonment. The author appealed to the Supreme Court, but leave to appeal was denied in early March 1991. On 17 February 1992, the author filed a petition for re-opening of the case. By order of 8 July 1992, the Court of Appeal refused the request. The author again appealed the order to the Supreme Court which, on 24 September 1992, ruled that the case was not to be re-opened.

2.2 The author contends that there was no case against him, except for the evidence given by another individual, S.B., already convicted of drug-related offences, who allegedly had been promised a reduction of his sentence in exchange for providing incriminating evidence against the author. In court, S.B. withdrew these allegations. In the same context, the author complains about the allegedly "racist" attitude of the investigating police officer, S.A., who reportedly made it clear that he "wished that people like me had never set foot in his country" (author's quote).

2.3 The author contends that under the terms of the initial indictment, he was accused of having travelled to the Netherlands in the early summer of 1989 to buy amphetamines. When he was able to produce evidence that, at the time in question, he was in Mauritius, the initial indictment allegedly was changed in court, after his own legal representative had contacted the prosecution and asked for the indictment to be changed. The author adds that it was impossible for him to have had any contacts with S.B. or his friends prior to or during the trial.

2.4 The author further contends that two jurors in the Court of Appeal were biased against him and that they openly stated that individuals such as the author, who lived on taxpayers' money, should be sent back to where they had come from. The remarks allegedly included slurs on the colour of the author's skin. Yet these jurors, although challenged, were not disqualified by the Court and participated in the deliberations of the verdict.

2.5 The State party gives the following version of the incident referred to by the author (see para. 2.4):

> "The Court record shows that during a break in the court proceedings, a law student, Ms. S.R.H., overheard a private conversation between two members of the jury, Ms. A.M.J. and Ms. S.M.M. This conversation was referred to defence counsel, who requested that one of the jurors be dismissed. The court called the law student and the two jurors to testify. [They] agreed on the facts: Ms. J. had expressed dismay at the defendant receiving NOK 9,000 a month without having to work for it, and had also said that he ought to be sent back to where he came from. Ms. M. had said that the purpose of a case like this was to get more information about the drug trafficking. The law student, Ms. H., had at this point entered the conversation, saying that the purpose of a case like this was to determine whether the defendant was guilty. According to the three witnesses, the question of guilt had otherwise not been mentioned by any of them.
>
> Defence counsel requested that Ms. J. be dismissed from the jury because, according to section 108 of the Courts' Act, a juror could be disqualified if there are circumstances ... apt to impair confidence in his or her impartiality. The Prosecutor claimed that nothing had been said that could influence the members of the jury, and that everyone was entitled to have opinions. Discussing private opinions during a break [was] no ground for disqualification, and the case itself had not been discussed by the three persons.
>
> The Court unanimously decided that Ms. J. should not be disqualified because she had not discussed the question of guilt in the present case, and the views she had expressed were not uncommon in Norwegian society."

The complaint

3.1 The author claims that racist considerations played a significant part in his conviction, as the evidence against him would not have supported a guilty verdict. He adds that he could not have expected to obtain a fair and impartial trial, as "all members of the jury came from a certain part of Oslo where racism is at its peak". He asserts that this situation violated his rights under the International Convention on the Elimination of All Forms of Racial Discrimination.

3.2 The author claims that other factors should be taken into consideration in assessing whether he was the victim of racial discrimination. In this context he mentions the amount of time spent in custody prior to the trial (381 days), out of which a total of nine months were allegedly spent in isolation, and the quality of his legal representation: thus, although he was assigned legal counsel free of charge, his representative "was more of a prosecutor than a lawyer of the defence". Finally, the author considers that a previous drug-related conviction, in 1983, was disproportionably and unreasonably used as character evidence against him during the trial in February 1991.

The State party's information and observations and author's comments

4.1 The State party considers that the communication should be declared inadmissible as manifestly ill-founded, "in accordance with the established practice in similar international human rights monitoring bodies".

4.2 As to the author's claim that he was denied his right to equal treatment before the courts because the jurors were selected from a part of Oslo known for a prevalence of racist opinions, the State party notes that no documentation has been adduced in support of this contention. Author's counsel only requested that one juror be disqualified; for the rest of the jurors, it is submitted that the matter should have been raised in court, and domestic remedies cannot be deemed exhausted in their respect.

4.3 After explaining the operation of section 108 of the Courts' Act (governing the disqualification of jurors), the State party points out that it is not uncommon for jurors to have negative feelings towards the defendant in a criminal case, but that this does not imply that they are incapable of giving the defendant a fair hearing. In the instant case, the views expressed by the jurors were of a general nature, and the court's decision not to disqualify the juror was unanimous.

4.4 As to the author's claim of unfairly expeditious dismissal of his appeal to the Supreme Court, the State party notes that under section 335, subsection 2, of the Code of Criminal Procedure, no appeal may be filed with the Supreme Court if it merely concerns the evaluation of evidence in the case. In the author's case, the appeal was based on two grounds: the issue of the jury's impartiality (as a procedural error) and the severity of the prison term imposed on the author. The State party notes that under Section 349 of the Code of Criminal Procedure, leave to appeal should not be granted if the Appeals Board is unanimous that an appeal would not succeed. Under Section 360, procedural errors shall only be taken into consideration if they are deemed to have affected the substance of the judgement. In the author's case, the issue of the length of the prison term was considered, but as the answer to whether the Supreme Court should

hear the appeal was negative, it was deemed unlikely that the sentence would be reduced. Concluding on this issue, the State party insists that there is no indication that the author was not given the same opportunities to defend his case before the courts as other individuals, in connection both with the appeal and the request for a re-opening of the case, regardless of race, colour of skin, ethnic origin, etc.

4.5 As to the length of the pre-trial detention, the State party explains that a little over one year of pre-trial custody is not unusual in cases involving drug-related offences. According to the State party, the delay of nine months from arrest to the dispatch of the indictment to the Court of Appeal was partly attributable to the author himself, since he changed his lawyer several times while in custody, which in turn delayed the preparations for the main hearing. The State party submits that nothing indicates that the author was kept in custody longer than other suspects merely because of his origin; this part of the complaint therefore is also said to be inadmissible as manifestly ill-founded.

4.6 Finally, the State party dismisses as manifestly ill-founded the author's complaint about the quality of his legal representation. Under Section 107 of the Code of Criminal Procedure, a court-appointed lawyer is remunerated by the State; the author had the opportunity to choose his own counsel throughout the judicial proceedings, and it cannot be said that he was subjected to racial discrimination in this respect.

5.1 In his comments, the author challenges the State party's submission on various procedural and factual grounds. He claims that the State party's version of the judicial proceedings is one-sided, because it is adapted from the Court Book, which according to him reveals little of substance. He further asserts that in a letter to the Registry of the Supreme Court, the prosecutor himself admitted that the only prosecution witness against Mr. Narrainen acknowledged in court to have been pressed by the investigating officer to make a false and incriminating statement. As this virtually destroyed the probative value of the prosecution's case, the author concludes that he was convicted on the basis of racist ideas and serious errors committed by the investigating authorities.

5.2 The author reiterates that several factors in his case, including the gathering and the evaluation of evidence, the omission of important statements in the court book, the absence of serious preparation of his defence by the court-appointed lawyers, the handling of his appeal, all underline that he was denied a fair and impartial hearing, and that his conviction was based on racist considerations.

The Committee's admissibility decision

6.1 During its forty-second session in March 1993, the Committee examined the admissibility of the case. It duly considered the State party's contention that the author's complaint was inadmissible as his allegations were either unsubstantiated or unfounded but concluded that the communication satisfied the conditions for admissibility laid down in rule 91 of the Committee's rules of procedure.

6.2 On 16 March 1993, therefore, the Committee declared the communication admissible insofar as it may raise issues under article 5 (a) of the Convention.

The State party's observations on the merits and counsel's comments

7.1 The State party dismisses as incorrect the author's allegation that the members of the jury in his trial came from those parts of Oslo where racism is rampant and that they had neo-Nazi affiliations. It notes that the list of jurors in the case was drawn up in accordance with Chapter 5 of the Courts Act, that neither prosecutor nor counsel for the defence objected to the way the list was drawn up, and that counsel challenged two jurors whose names appeared on the initial list. Six of the jurors came from areas outside Oslo, and four from different parts of Oslo. The State party notes that no part of Oslo can be described as particularly racist, and that neither the courts nor the Government have any knowledge about the affiliation of jurors with political parties. However, the procedure for jury selection makes it unlikely that jurors from fringe parties will be chosen, as jurors are drawn by lot from lists that are provided by municipal politicians.

7.2 As to the impartiality of the jurors, the State party reiterates its earlier observation (see para. 2.5). It adds that the person who had made the inimical remarks during court recess, Ms. J., is a salaried worker who, in 1990, earned less income than the author received in terms of social benefits during the same year. In these circumstances, the State party submits, the rather general remarks of Ms. J. were "a not very surprising reaction to a matter that must have seemed unjust to her".

7.3 The State party recalls that the issue of whether the fact that the remark was made meant that Mr. Narrainen did not receive a fair trial was examined in detail by the Interlocutory Appeals Committee of the Supreme Court since, under Section 360, paragraph 2 lit. 3, of the Norwegian Code of Criminal Procedure, a judgement is declared null and void by the Supreme Court if it is found that one of the jurors was disqualified. According to the State party, the fact that the Interlocutory Appeals Committee denied leave to appeal to the Supreme Court implies that the Board considered it obvious that there were no circumstances in the case likely to impair confidence in the impartiality of Ms. J. It is noted that in deciding whether leave to appeal to the Supreme Court shall be granted or not, the Interlocutory Appeals Committee also relies on international instruments such as CERD as relevant sources of law.

7.4 In respect of the assessment of evidence in the case, the State party explains the rationale for trying cases involving crimes punishable with imprisonment of six years or more at first instance before the High Court. In such cases, the court is constituted of three professional judges and a jury of 10; the jury decides on the question of guilt. A judgement of the High Court may be appealed to the Supreme Court, but errors in the evaluation of evidence in relation to the question of guilt are not permissible grounds of appeal (section 335, paragraph 2, of the Code of Criminal Procedure). The State party explains that "it is important that serious criminal cases are dealt with in a reassuring manner from the beginning. This is why such cases are dealt with in the High Court, with a jury, at first instance. The jury decides on the guilt. This is common practice, based on the principle that a defendant shall be judged by equals ... This principle would be of little value if the jury's assessment of evidence ... could be overruled by the professional judges in the Supreme Court".

7.5 As to the admissibility of the evidence placed before the High Court and the alleged pressure exerted by the police on witness S.B. to make a false statement, the State party recalls that Norwegian courts assess evidence freely. That Mr. Narrainen was convicted indicates that

in the case, the jurors did not believe S.B. when he retracted his earlier statement and claimed that the author was innocent. In this context, the State party submits that the most likely explanation for S.B.'s attitude in court was his fear of reprisals if he upheld his earlier statement; it notes that S.B., himself a detainee at the prison of Bergen, was placed under pressure to withdraw his initial statement at around the time the author himself arrived at the prison, and that he was afraid of reprisals. Still in the same context, the State party dismisses as incorrect or misleading parts of the author's statements reproduced in paragraph 5.1 above.

7.6 The State rejects as incorrect the author's claim that S.B. was promised a reduced sentence in exchange for providing incriminating evidence against the author, as neither the police nor the public prosecutor are competent to engage in any plea bargaining with the accused. The State party similarly rejects as unfounded the author's claim that S.B. was "promised a cosy place to serve his sentence" in exchange for information on the author: in fact, S.B. was confined to the main prison for the Rogaland area where, according to his own statement, he was subjected to considerable pressure from other prisoners, including the author.

7.7 Concerning the use of a previous conviction as evidence against Mr. Narrainen, the State party submits that it is normal under Norwegian criminal law to admit such evidence, and that there is absolutely no evidence that the admission of the evidence had any connection with the author's ethnic origin.

7.8 With regard to the alleged illegal change in the author's indictment, the State party refers to section 38, paragraph 2, of the Code of Criminal Procedure, which stipulates that "with regard to the penal provision applicable to the matter, the Court is not bound by the indictment ... The same applies with regard to punishment and other sanctions applicable". A change in the determination of which provision is applicable to the same offence can also be made by the prosecutor's office (Section 254, paragraph 3, of the Code of Criminal Procedure); this is what occurred in the author's case. The State party explains that the reason why the applicable provision may be changed, after indictment but before start of the trial, is that the defendant is not being charged with a new offence; it is simply a question of choosing the appropriate provision applicable to the same facts.

7.9 Finally, as to the duration of Mr. Narrainen's pre-trial detention the State party reiterates its comments detailed in paragraph 4.5 above. As to the quality of his counsel, it recalls that since the author "was imprisoned in Oslo, he had the opportunity to choose between many highly qualified lawyers". It explains that when the court has appointed a legal aid representative, it will not appoint another one unless asked to do so by the defendant: therefore, any lawyer assisting Mr. Narrainen must have been chosen pursuant to his requests. The State party concludes that there is no reason to believe that Mr. Narrainen did not receive the same legal services as any other accused. Rather, he was given every opportunity to request a new representative every time he was dissatisfied with his previous one, thereby using the "safeguard provisions" of the criminal procedure system to the full.

8.1 In his comments on the State party's submission, counsel provides detailed information about the composition of juries under the criminal justice system. According to recent statistics, 43 per cent of foreign nationals residing in Norway live in Oslo or neighbouring boroughs. Of

the foreign-born Norwegian citizens some 60,516, of which half come from Latin America, Asia and Africa, lived in Oslo. Between 10 and 15 per cent of all persons living in Oslo have cultural and ethnic backgrounds that differ from the rest of the population.

8.2 Counsel observes that few if any foreigners or foreign-born Norwegians figure in lists from which jury members are selected. Eidsivating High Court was unwilling to provide him with a copy of the jury lists from the Oslo area, on the ground that the lists, comprising some 4,000 names, contain private data that should not be made public. According to counsel, Norwegian court practice clearly shows that Norwegian juries are all white - in interviews with prosecutors, lawyers and convicted prisoners, no one remembered ever having met a coloured member of a jury. This information is corroborated by a newspaper report, dated 24 February 1994, which screens the lists of jurors provided by the city of Oslo. It states that out of 2,306 individuals, no more than 25 have a foreign background, and most of the foreign names are English, German or American ones. It further notes that according to official statistics, 38,000 foreign nationals aged 20 or more live in Oslo; another 67,000 persons were either born abroad or have foreign parents.

8.3 Counsel notes that the reason for the lack of equal representation of ethnic groups in juries may be explained by the fact that local political parties appear reluctant to nominate members of such groups and the fact that five years of residence in Norway and proficiency in Norwegian are prerequisites for jury duty. Counsel opines that this situation should prompt the Norwegian high courts to give special attention to ensuring a fair trial for coloured defendants.

8.4 As to the alleged impartiality of the jurors, counsel subscribes to the analysis of the allegedly racist remark of Ms. J. made by the lawyer who appealed on the author's behalf to the Supreme Court. In his brief to the Interlocutory Appeals Committee, this lawyer argued, by reference to section 135 (a) of the Criminal Code which prohibits public expressions of racism, that remarks such as Ms. J's aimed at an accused person are particularly reprehensible if made during the proceedings in front of a member of the audience, and if made in a case such as the author's, who was foreign-born. To this lawyer, Ms. J., when repeating her statement from the witness stand, gave the clear impression of harbouring racial prejudices against persons of foreign origin.

8.5 Counsel further doubts that, given the extremely heavy workload of the Interlocutory Appeals Committee which handles an average of 16 cases per day, the Appeals Committee really had the time to take into consideration all the relevant factors of the author's case, including those concerning racial discrimination under international law. He further notes that the parties are not represented before the Interlocutory Appeals Committee which, moreover, does not give any reasons for its decision(s).

8.6 Concerning the evaluation of evidence in the case, counsel notes that Mr. Narrainen was convicted on the basis of one police report and the testimonies of the police officers who had taken the statement of S.B. That this lack of other substantial evidence against Mr. Narrainen raised doubts about his guilt was demonstrated by the fact that one of the three judges in the case found that the guilt of the accused had <u>not</u> been proven beyond reasonable doubt. Counsel

argues that it cannot be excluded that some of the jurors had similar doubts; in the circumstances, the presence in the jury of a person who had displayed evidence of bias against the author may easily have tipped the balance.

8.7 In the light of the above, counsel claims that the Norwegian courts violated article 5 (a) of the Convention through the judgement of the High Court of 6 February 1991 and the decision of the Interlocutory Appeals Committee of 7 March 1991. While the juror's remark may not in itself have amounted to a violation of the Convention, the fact that Ms. J was not removed from the jury constituted a violation of article 5 (a). In this context, counsel refers to the Committee's Opinion in the case of L.K. v. Netherlands,[1] where it was held that the enactment of legislation making racial discrimination a criminal offence does not in itself represent full compliance with the obligations of States parties under the Convention.

8.8 Counsel concludes that the way in which Norwegian juries are constituted does not ensure racial equality, that the remark made by Ms. J. to another juror was evidence of bias against the author because of his origin and colour, and that neither the High Court nor the Interlocutory Appeals Committee devoted appropriate attention to counsel's claim of racial discrimination or properly evaluated the possibility of a violation of Norway's obligations under the Convention.

Examination of the merits

9.1 The Committee has considered the author's case in the light of all the submissions and documentary evidence produced by the parties. It bases its findings on the following considerations.

9.2 The Committee considers that in the present case the principal issue before it is whether the proceedings against Mr. Narrainen respected his right, under article 5 (a) of the Convention, to equal treatment before the tribunals, without distinction as to race, colour or national or ethnic origin. The Committee notes that the rule laid down in article 5 (a) applies to all types of judicial proceedings, including trial by jury. Other allegations put forward by the author of the communication are in the Committee's view outside the scope of the Convention.

9.3 If members of a jury are suspected of displaying or voicing racial bias against the accused, it is incumbent upon national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased.

9.4 In the present case, the inimical remarks made by juror Ms. J. were brought to the attention of the Eidsivating High Court, which duly suspended the proceedings, investigated the issue and heard testimony about the allegedly inimical statement of Ms. J. In the view of the Committee, the statement of Ms. J. may be seen as an indication of racial prejudice and, in the light of the provision of article 5 (a) of the Convention, the Committee is of the opinion that this

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[1] Communication No. 4/1991 (L.K. v. Netherlands), Opinion adopted on 16 March 1993, paragraph 6.4.

remark might have been regarded as sufficient to disqualify the juror. However, the competent judicial bodies of Norway examined the nature of the contested remarks, and their potential implications for the course of the trial.

9.5 Taking into account that it is neither the function of the Committee to interpret the Norwegian rules on criminal procedure concerning the disqualification of jurors, nor to decide as to whether the juror had to be disqualified on that basis, the Committee is unable to conclude, on the basis of the information before it, that a breach of the Convention has occurred. However, in the light of the observations made in paragraph 9.4, the Committee makes the following recommendations pursuant to article 14, paragraph 7, of the Convention.

10. The Committee recommends to the State party that every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination. Consequently, the Committee recommends that in criminal cases like the one it has examined, due attention be given to the impartiality of juries, in line with the principles underlying article 5 (a) of the Convention.

D. Communication No. 4/1991

Submitted by: L.K.*
[represented by counsel]

State party concerned: The Netherlands

Date of communication: 6 December 1991
(date of initial letter)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 16 March 1993,

Having decided, under rule 94, paragraph 7, of its rules of procedure to deal jointly with the question of admissibility and the merits of the communication,

Having ascertained that the communication meets the criteria for being declared admissible,

Having concluded its consideration of communication No. 4/1991, submitted to the Committee by L.K. under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it on behalf of L.K. and by the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1. The author of the communication (dated 6 December 1991) is L.K., a Moroccan citizen currently residing in Utrecht, the Netherlands. He claims to be a victim of violations by the Netherlands of articles 2, paragraph 1 (d); 4 litera c), 5, litera d (i) and litera e (iii); and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The author is represented by counsel.

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* At his request, the name of the author is not disclosed.

The facts as found by the Committee

2.1 On 9 August 1989, the author, who is partially disabled, visited a house for which a lease had been offered to him and his family, in the Nicholas Ruychaverstraat, a street with municipal subsidized housing in Utrecht. He was accompanied by a friend, A.B. When they arrived, some 20 people had gathered outside the house. During the visit, the author heard several of them both say and shout: "No more foreigners". Others intimated to him that if he were to accept the house, they would set fire to it and damage his car. The author and A.B. then returned to the Municipal Housing Office and asked the official responsible for the file to accompany them to the street. There, several local inhabitants told the official that they could not accept the author as their neighbour, due to a presumed rule that no more than 5 per cent of the street's inhabitants should be foreigners. Told that no such rule existed, street residents drafted a petition, which noted that the author could not be accepted and recommended that another house be allocated to his family.

2.2 On the same day, the author filed a complaint with the municipal police of Utrecht, on the ground that he had been the victim of racial discrimination under article 137 (litera c and d) of the Criminal Code (Wetboek van Strafrecht). The complaint was directed against all those who had signed the petition and those who had gathered outside the house. He submits that initially, the police officer refused to register the complaint, and that it took mediation by a local anti-discrimination group before the police agreed to prepare a report.

2.3 The State party's version of the facts coincides to a large extent with that given by the author, with some differences. According to the State party, the author visited the house allocated to him by the Municipality of Utrecht twice, once on 8 August 1989, together with an official of the Utrecht Municipal Housing Department, and again on 9 August 1989 with a friend. During the first visit, the official started a conversation with a local resident, a woman, who objected to the author as a future tenant and neighbour. During the conversation, several other residents approached and made remarks such as "We've got enough foreigners in this street" and "They wave knives about and you don't even feel safe in your own street". While the author was no longer present when these remarks were made, the Housing Department official was told that the house would be set on fire as soon as the prior tenant's lease had expired. As to the second visit, it is submitted that when the author arrived at the house with a friend. A.B., a group of local residents had already gathered to protest against the potential arrival of another foreigner. When the author remained reluctant to reject the Housing Department's offer, the residents collected signatures on a petition. Signed by a total of 28 local residents, it bore the inscription "Not accepted because of poverty? Another house for the family please?", and was forwarded to the Housing Department official.

2.4 In response to the complaint of 9 August 1989, the police prepared a report on the incident (Proces-Verbal No. 4239/89) on 25 September 1989; according to the State party, 17 out of the 28 residents who had signed the petition had been questioned by the police, and 11 could not be contacted before the police report was finalized.

2.5 In the meantime, the author's lawyer had apprised the prosecutor at the District Court of Utrecht of the matter and requested access to all the documents in the file. On 2 October 1989, the prosecutor forwarded these documents, but on 23 November 1989 he informed the author

that the matter had not been registered as a criminal case with his office, because it was not certain that a criminal offence had taken place. On 4 January 1990, therefore, counsel requested the Court of Appeal of Amsterdam (Gerechtshof) to order the prosecution of the "group of residents of the Nicholas Ruychaverstraat in Utrecht" for racial discrimination, pursuant to article 12 of the Code of Criminal Procedure.

2.6 Counsel submits that after several months, he was informed that the Registry of the Court of Appeal had indeed received the case file on 15 January 1990. On an unspecified date but shortly thereafter, the Prosecutor-General at the Court of Appeal had requested further information from the District Court Prosecutor, which was supplied rapidly. However, it was not until 10 April 1991 that counsel was able to consult the supplementary information, although he had sought to obtain it on several occasions between 15 February 1990 and 15 February 1991. It was only after he threatened to apply for an immediate judgement in tort proceedings against the prosecutor at the Court of Appeal that the case was put on the Court agenda for 10 April 1991. On 5 March 1991, the Prosecutor-General at the Court of Appeal asked the Court to declare the complaint unfounded or to refuse to hear it on public interest grounds.

2.7 Before the Court of Appeal, it transpired that only two of the street's inhabitants had actually been summoned to appear; they did not appear personally but were represented. By judgement of 10 June 1991, the Court of Appeal dismissed the author's request. It held inter alia that the petition was not a document of deliberately insulting nature, nor a document that was inciting to racial discrimination within the meaning of article 137, literae (c) and (e), of the Criminal Code. In this context, the Court of Appeal held that the heading to the petition - which, taking into account statements made during the hearing and to the police, should be interpreted as meaning "Not accepted because of a fight? Another house for the family please?" - could not be considered to be insulting or as an incitement to racial discrimination, however regrettable and undesirable it might have been.

2.8 Under article 12 of the Code of Criminal Procedure, counsel requested the Prosecutor-General at the Supreme Court to seek the annulment of the decision of the Court of Appeal, in the interest of law. On 9 July 1991, the request was rejected. As a last resort, counsel wrote to the Minister of Justice, asking him to order the prosecutor to initiate proceedings in the case. The Minister replied that he could not grant the request, as the Court of Appeal had fully reviewed the case and there was no scope for further proceedings under article 12 of the Code of Criminal Procedure. However, the Minister asked the Chief Public Prosecutor in Utrecht to raise the problems encountered by the author in tripartite consultations between the Chief Public Prosecutor, the Mayor and the Chief of the Municipal Police of Utrecht. At such tripartite consultations on 21 January 1992, it was agreed that anti-discrimination policy would receive priority attention.

The complaint

3.1 The author submits that the remarks and statements of the residents of the street constitute acts of racial discrimination within the meaning of article 1, paragraph 1, of the Convention, as well as of article 137, literae (c), (d) and (e), of the Dutch Criminal Code; the

latter provisions prohibit public insults of a group of people solely on the basis of their race, public incitement of hatred against people on account of their race, and the publication of documents containing racial insults of a group of people.

3.2 The author contends that the judicial authorities and the public prosecutor did not properly examine all the relevant facts of the case or at least did not formulate a motivated decision in respect of his complaint. In particular, he submits that the police investigation was neither thorough nor complete. Thus, A.B. was not questioned; and street residents were only questioned in connection with the petition, not with the events outside the house visited by the author on 8/9 August 1989. Secondly, the author contends that the decision of the prosecutor not to institute criminal proceedings remained unmotivated. Thirdly, the prosecutor is said to have made misleading statements in an interview to a local newspaper in December 1989, in respect of the purported intentions of the street residents vis-à-vis the author. Fourthly, the Prosecutor-General at the Court of Appeal is said to have unjustifiably prolonged the proceedings by remaining inactive for over one year. Finally, the Court of Appeal itself is said to have relied on incomplete evidence.

3.3 Author's counsel asserts that the above reveals violations of articles 2, paragraph 1 (d), juncto 4 and 6; he observes that articles 4 and 6 must be read together with the first sentence and paragraph 1, litera (d) of article 2, which leads to the conclusion that the obligations of States parties to the Convention are not met if racial discrimination is merely criminalized. Counsel submits that although the freedom to prosecute or not to prosecute, known as the expediency principle, is not set aside by the Convention, the State party, by ratifying the Convention, accepted to treat instances of racial discrimination with particular attention, inter alia, by ensuring the speedy disposal of such cases by domestic judicial instances.

The State party's information and observations and counsel's comments

4.1 The State party does not formulate objections to the admissibility of the communication and concedes that the author has exhausted available domestic remedies. It also acknowledges that article 137, literae (c), (d), and (e), of the Criminal Code are in principle applicable to the behaviour of the street's residents.

4.2 In respect of the contention that the police investigations of the case were incomplete, the State party argues that it is incorrect to claim that the residents of the street were questioned only about the petition. A number of residents made statements about the remark that a fire would be set if the author moved into the house. The State party also contends that although lapse of time makes it impossible to establish why A.B. was not called to give evidence before the Court of Appeal, it is "doubtful ... whether a statement from him would have shed a different light on the case. After all, no one disputes that the remarks objected to were made".

4.3 The State party similarly rejects the contention that the prosecutor did not sufficiently motivate the decision not to prosecute and that the interview given by the press officer of the prosecutor's office to an Utrecht newspaper on 6 December 1989 was incomplete and erroneous. Firstly, it observes that the decision not to prosecute was explained at length in the letter dated 25 June 1990 from the public prosecutor in Utrecht to the Prosecutor-General at the Amsterdam

Court of Appeal, in the context of the author's complaint filed under article 12 of the Code of Criminal Procedure. Secondly, the interview of 6 December 1989 did not purport to reflect the opinion of the public prosecutor's office but that of the residents of the street.

4.4 In respect of the contention that the proceedings before the Court of Appeal were unduly delayed, the State party considers that although the completion of the report by the Prosecutor-General took longer than anticipated and might be desirable, a delay of 15 months between lodging of the complaint and its hearing by the Court of Appeal did not reduce the effectiveness of the remedy; accordingly, the delay cannot be considered to constitute a violation of the Convention.

4.5 The State party observes that Dutch legislation meets the requirements of article 2, paragraph 1 (d), of the Convention, by making racial discrimination a criminal offence under articles 137, literae (c) et seq. of the Criminal Code. For any criminal offence to be prosecuted, however, there must be sufficient evidence to warrant prosecution. In the Government's opinion, there can be no question of a violation of articles 4 and 6 of the Convention because, as set out in the public prosecutor's letter of 25 June 1990, it had not been sufficiently established that any criminal offence had been committed on 8 and 9 August 1989, or who had been involved.

4.6 In the State party's opinion, the fact that racial discrimination has been criminalized under the Criminal Code is sufficient to establish compliance with the obligation in article 4 of the Convention, since this provision cannot be read to mean that proceedings are instituted in respect of every type of conduct to which the provision may apply. In this context, the State party notes that decisions to prosecute are taken in accordance with the expediency principle, and refers to the Committee's opinion on communication 1/1984 addressing the meaning of this very principle.[1] The author was able to avail himself of an effective remedy, in accordance with article 6 of the Convention, because he could and did file a complaint pursuant to article 12 of the Code of Criminal Procedure, against the prosecutor's refusal to prosecute. The State party emphasizes that the review of the case by the Court of Appeal was comprehensive and not limited in scope.

4.7 Finally, the State party denies that it violated article 5 (d) (i) and (e) (iii) of the Convention vis-à-vis the author; the author's right to freely choose his place of residence was never impaired, either before or after the events of August 1989. In this context, the State party refers to the Committee's Opinion on communication No. 2/1989, where it was held that the rights enshrined in article 5 (e) of the Convention are subject to progressive implementation, and that it was "not within the Committee's mandate to see to it that these rights are established" but rather to monitor the implementation of these rights, once they have been granted on equal terms.[2] The State party points out that "appropriate rules have been drawn up to ensure an equitable distribution of housing ...", and that these rules were applied to the author's case.

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[1] Yilmaz-Dogan v. Netherlands, Opinion of 10 August 1988. para. 9.4.

[2] D.T. Diop v. France, Opinion of 18 March 1991, para. 6.4.

5.1 In his comments, counsel challenges several of the State party's observations. Thus, he denies that the police inquiry was methodical and asserts that A.B. could and indeed would have pointed out those who made threatening and discriminatory remarks on 9 August 1989, had he been called to give evidence. Counsel further submits that he was not able to consult the public prosecutor's decision of 25 June 1990 not to institute criminal proceedings until 10 April 1991, the date of the hearing before the Court of Appeal.

5.2 Counsel takes issue with the State party's version of the prosecutor's interview of 6 December 1989 and asserts that if the press officer related the version of the street residents without any comment whatsoever, she thereby suggested that their account corresponded to what had in fact occurred. Finally, counsel reaffirms that the judicial authorities made no effort to handle the case expeditiously. He notes that criminal proceedings in the Netherlands should duly take into account the principles enshrined in article 6 of the European Convention on the Protection of Human Rights, of which the obligation to avoid undue delays in proceedings is one.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, decide whether or not it is admissible under the Convention. Under rule 94, paragraph 7, the Committee may, in appropriate cases and with the consent of the parties concerned, join consideration of the admissibility and of the merits of a communication. The Committee notes that the State party does not raise objections to the admissibility of the communication, and that it has formulated detailed observations in respect of the substance of the matter under consideration. In the circumstances, the Committee decides to join consideration of admissibility and consideration of the merits of the communication.

6.2 The Committee has ascertained, as it is required to do under rule 91, that the communication meets the admissibility criteria set out therein. It is, therefore, declared admissible.

6.3 The Committee finds on the basis of the information before it that the remarks and threats made on 8 and 9 August 1989 to L.K. constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin, contrary to article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, and that the investigation into these incidents by the police and prosecution authorities was incomplete.

6.4 The Committee cannot accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention.

6.5 The Committee reaffirms its view as stated in its Opinion on Communication No. 1/1984 of 10 August 1987 (Yilmaz-Dogan v. Netherlands) that "the freedom to prosecute criminal offences - commonly known as the expediency principle - is governed by considerations of

public policy and notes that the Convention cannot be interpreted as challenging the raison d'être of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention".

6.6 When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition. In the instant case, the State party failed to do this.

6.7 The Committee finds that in view of the inadequate response to the incidents, the police and judicial proceedings in this case did not afford the applicant effective protection and remedies within the meaning of article 6 of the Convention.

6.8 The Committee recommends that the State party review its policy and procedures concerning the decision to prosecute in cases of alleged racial discrimination, in the light of its obligations under article 4 of the Convention.

6.9 The Committee further recommends that the State party provide the applicant with relief commensurate with the moral damage he has suffered.

7. Pursuant to rule 95, paragraph 5, of its rules of procedure, the Committee invites the State party, in its next periodic report under article 9, paragraph 1, of the Convention, to inform the Committee about any action it has taken with respect to the recommendations set out in paragraphs 6.8 and 6.9 above.

E. Communication No. 6/1995

Submitted by: Z.U.B.S.

Alleged victim: The author

State party concerned: Australia

Date of communication: 17 January 1995 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 26 August 1999,

Having concluded its consideration of communication No. 6/1995, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1. The author of the communication is Mr. Z.U.B.S., an Australian citizen of Pakistani origin born in 1955, currently residing in Eastwood, New South Wales, Australia. He claims to be a victim of violations by Australia of several provisions of the International Convention on the Elimination of All Forms of Racial Discrimination.

The facts as submitted by the author

2.1 In February 1993 the author, who had by then been residing for approximately two years in Australia, was hired as an engineering officer by the New South Wales Fire Brigade (NSWFB), which is part of the Public Service. Before being hired, he had applied for two higher-level positions which he claims were commensurate with his qualifications, experience and skills. He was, however, interviewed and hired for a lower-level position for which he had not applied and for which he contends that he was not provided with a job description. He says he was adversely treated in appointment because he lacked (so-called) local knowledge, a requirement that was not mentioned in the position description or the list of desirable criteria and had no relevance to the job performance. He claims that local experience was a requirement created by the selection committee after receiving his personal details, which reflected his past professional experience of 13 years in Pakistan and Saudi Arabia.

2.2 According to the author, his position was identical to that of two other engineering officers. One of them was Australian born Anglo-origin and the other was a Buddhist Malaysian-Chinese. The three were hired almost at the same time. He claims that the difference in treatment between himself (an experienced professional engineer) and the other two officers (sub-technicians) was racially motivated. Such differentiation allegedly included that the author's qualifications exceeded those of his colleagues, that his salary was inferior to that of one of the officers and that he was placed on six months probation, unlike one of the officers. In each case, he was treated the same as the other colleague, although he argues that he was not informed of the probationary requirement.

2.3 The author contends that he was given a heavier workload compared to his colleagues, that his participation in business trips was limited, and that his access to workplace information was curtailed. He alleges harassment and unfair treatment in the performance of his duties; he notes, for example, that one day he was ridiculed for refusing to drink beer with colleagues towards the end of one day's duties, although he had pointed out that his origin and religion did not allow him to drink alcoholic beverages. He says that he was continuously reminded of his background (professional and social) from Pakistan and Saudi Arabia through racially motivated comments.

2.4 After he had filed two complains with the relevant department under the Fire Brigade's grievance policy, the management prepared a report on his "poor performance". On 30 July 1993, he lodged a complaint of racial discrimination in employment with the New South Wales Anti-Discrimination Board (ADB), indicating that the matter was "urgent". On 6 August 1993 his employment was terminated, allegedly without written notice. The author informed the ADB of this development by fax of 9 August 1993. After his dismissal the three positions were upgraded and the other two officers were re-employed in two of the three vacant positions without competition.

2.5 The author alleges that the handling of his claim by the ADB was biased and discriminatory, and that the bias was racially motivated. He bases this assessment on the delay in the handling of his case which, in his opinion, led to his being dismissed. He contends that in a telephone conversation with a senior conciliation officer of the ADB on 12 August 1993, the ADB had taken part of his former employer, as ADB agreed with the employer's suggestion that he should appeal to the Government and Related Employees Appeal Tribunal (GREAT). GREAT examines cases of wrongful dismissal, whereas ADB processes cases of racial discrimination. The author was therefore reluctant to file his grievances with GREAT, and took ADB's suggestion to mean that ADB did not believe that it was faced with a case of racial discrimination.

2.6 The author consulted with the NSW Legal Aid Commission (LAC) with a view to obtaining legal aid for proceedings before GREAT. However, in accordance with the Legal Aid Commission Act, legal aid is not provided in respect of matters before the GREAT. On 30 August 1993, the author addressed a letter to the ADB, confirming his decision not to proceed with an appeal before GREAT and asking ADB to give priority to his complaint.

2.7 The author also contacted the New South Wales Council for civil Liberties (NSWCCL) which informed him, on 1 July 1994, that his complaint had been forwarded to the Council's Complaints Sub-Committee for further consideration. After that, the NSWCCL never contacted him again.

2.8 On 19 December 1994, ADB informed the author that its investigation had been completed, and that the complaint had been found without merit. No reasons for this evaluation were provided. At the same time he was informed of his right to appeal the decision within 21 days to the Equal Opportunity Tribunal (EOT). However, the procedure before the EOT is long and expensive, and the author could not pay the costs for representation since he remained unemployed after his dismissal. He claims that the LAC again refused to provide him with legal assistance on the basis of biased criteria. He further complains about the manner in which the EOT and the NSW Ombudsman handled his case subsequently.

2.9 Finally, the author claims that the conduct and practices of the State party's organs, including the EOT, had a discriminatory effect on his professional career and that he has not been able to find a suitable employment since his dismissal in 1993.

The complaint

3. It is submitted by the author that the facts stated above amount to violations of the following provisions of the Convention:

- Articles 3, 5 (c), 5 (e) (i) and 6 by the NSWFB, in that he was discriminated on racial grounds in the terms of his appointment, in his employment conditions and in the termination of his employment. He also alleged race-based harassment and offensive behaviour on the part of colleagues.

- Articles 5 (a) and 6 by the ADB, the EOT, the Ombudsman and the LAC. He contends that the ADB did not handle his urgent complaint impartially, that it victimized and disadvantaged him and that by delaying the case for 22 months it protected the personnel of the NSWFB. He also complains about the way in which EOT evaluated the facts and the evidence presented during the hearings held from 11 to 15 September 1995 as well as the conduct of the Ombudsman who, without contacting him, accepted the ADB's version of the dispute. He was particularly disappointed in view of the fact that the NSW Ombudsman in office served as Race Discrimination Commissioner in the Federal Human Rights and Equal Opportunities Commission for several years and was fully aware of racism in Australia, including the ADB's general attitude in handling complaints of race discrimination.

- Article 2, in connection with the above-mentioned provisions.

State party's observations on admissibility and author's comments thereon

4.1 In a submission dated March 1996, the State party noted that when the author initially submitted his case to the Committee, it was clearly inadmissible for non-exhaustion of domestic remedies, as the author had then instituted proceedings before the EOT. On 30 October 1995,

however, the EOT handed down a judgement in the author's favour by which it awarded him $A 40,000 of damages and ordered his former employer to address a written apology (within 14 days) to him. While the EOT dismissed the author's claims of racial discrimination, it did find that the author's dismissal as a result of his complaint amounted to victimization. Victimization of an individual who has initiated a complaint of racial discriminations is unlawful under section 50 of the New South Wales Anti-Discrimination Act of 1977.

4.2 The State party considered that with the judgement of the EOT, the author's case should be considered closed. It added that the author could have appealed the judgement on a point of law, but that no notification of appeal had been received.

4.3 In June 1997, the State party transmitted further admissibility observations to the Committee. It argued that the claim under article 2 of the Convention should be considered inadmissible as incompatible with the provisions of the Convention, pursuant to rule 91 (c) of the rules of procedure. It pointed out that the Committee had no jurisdiction to review the laws of Australia in abstracto, and that, in addition, no specific allegations had been made by the author in relation to article 2. If the Committee were to consider itself competent to review the allegation, then it should be rejected as inadmissible ratione materiae. It argued that the author's rights under article 2 were accessory in nature, and that if no violation under articles 3, 5 or 6 of the Convention was established in relation to the conduct of the NSWFB, the ADB, the EOT, the Ombudsman's Office or the LAC, then no violation of article 2 could be established either. Subsidiarily, the State party contended that if the Committee were to hold that article 2 was not accessory in nature, it remained the case that the author did not provide prima facie evidence that the above bodies engage in acts or practices of racial discrimination against him.

4.4 The State party also rejected the author's claims of a violation of article 3 of the Convention in that he "was segregated ... from English speaking background personnel during a trip to Melbourne and in an external training course". That was deemed inadmissible as incompatible ratione materiae with the Convention. For the State party, the author had failed to raise an issue in relation to article 3. Subsidiarily, it was argued that the claim under article 3 had been insufficiently substantiated for the purposes of admissibility: there was no system of racial segregation or apartheid in Australia.

4.5 The State party submitted that the claim of a violation of article 5 (c) and (e) (i) of the Convention by the NSWFB, the EOT, the ADB, the Ombudsman and the LAC was inadmissible ratione materiae. In relation to the allegations against the conduct of the case by the EOT and the LAC it further argued that the author had failed to exhaust available and effective domestic remedies.

4.6 As to the author's claim that the NSWFB violated his rights under subparagraph 5 (c), to inter alia have equal access to public service and subparagraph 5 (e) (i), to work, to free choice of employment, to just and favourable conditions of work and just remuneration, the State party argued that:

- These allegations were reviewed by Australian tribunals in good faith and in accordance with established procedures. It would be incompatible with the role of the Committee to act as a further court of appeal in these circumstances;

- Subsidiarily, the State party submitted that alleged racial discrimination in employment had been insufficiently substantiated, for purposes of admissibility, as the author had not provided prima facie evidence which might give rise to a finding of racial discrimination.

4.7 As to the claim that the author's right to equal treatment before the ADB, the EOT, the Ombudsman and the LAC were violated, the State party argued that:

- These allegations (with the exception of the one against the LAC) were incompatible with the provisions of the Convention, on the ground that the Committee was not mandated to review the determination of facts and law of domestic tribunals, in particular in cases in which the complainant failed to exhaust available and effective domestic remedies;

- The claims related to the unfair and unequal treatment of the author by EOT and LAC were inadmissible, as the author failed to exhaust available domestic remedies. They could have been reviewed, respectively, by the New South Wales Supreme Court and the Legal Aid Review Committee. Neither avenue was pursued by the author.

4.8 With respect to the author's contention that the NSWFB, the ADB, the EOT, the Ombudsman and the LAC violated his rights under article 6 of the Convention, the State party submitted that:

- This allegation was inadmissible ratione materiae, as the alleged violations of the author's rights by the NSWFB and the ADB were properly reviewed by the domestic courts, "in a reasonable manner and in accordance with the law". The State party emphasizes that it was incompatible with the role of the Committee under the Convention to act as a further court of appeal in these circumstances. Australia had a domestic system which provided effective protection and remedies against any acts of racial discrimination. The mere fact that the author's allegations were dismissed did not mean that they were ineffective;

- Subsidiarily, the State party argued that the rights under article 6 of the Convention were similar to those enshrined in article 2 of the International Convenant on Civil and Political Rights. These are general rights which are accessory in nature and linked to the specific rights enshrined in the Convention. As no independent violation of articles 2, 3 and 5 of the Convention had been made out by the author, no violation of article 6 could be established;

- Still subsidiarily, the State party submitted that the allegations under article 6 had been insufficiently substantiated, for purposes of admissibility, as the author did not submit any prima facie evidence that he did not have the opportunity to seek effective protection and remedies against alleged acts of racial discrimination in his employment, in a manner similar to every individual in New South Wales.

5. In comments the author reiterated his allegations, claiming inter alia that:

- "six Anglo-Celtic officials" of the NSWFB "maliciously employed" him, treated him unfairly during his employment and victimized him when he complained about their attitude;

- he had exhausted all available domestic remedies under Australian anti-discrimination legislation, "although the remedies were unfair, extensively exhaustive and prolonged";

- he did not file an appeal against the decision of the LAC because the LAC's advice to appeal for a review of its decision "was not in good faith and was misleading";

- as for the proceedings before the EOT, the case was conducted "in a biased environment". A NSWFB barrister "tampered with subpoena documents" and removed files from the record. Moreover, EOT "planted" a document in his personnel file "in order to dismiss the case of racial discrimination against the members of the dominant race".

The Committee's admissibility decision

6.1 At its fifty-first session, in August 1997, the Committee examined the admissibility of the communication. The Committee noted that the author had alleged violations of articles 2 and 6 of the Convention by all the instances seized of his grievances, and of article 3 by the New South Wales Fire Brigade. The Committee did not agree with the State party's assessment that the author had failed to substantiate these allegations for purposes of admissibility and considered that only the examination on the merits would enable it to consider the substance of the author's claim.

6.2 The Committee noted that the author's claims under article 5 (c) and (e) (i) against his former employers, the New South Wales Fire Brigade, which were reviewed by the Equal Opportunities Tribunal, dismissed the author's claims as far as they were related to racial discrimination. The Committee did not agree with the State party's argument that to admit the author's claim would amount to a review, on appeal, of all the facts and the evidence in his case. At the admissibility stage, the Committee was satisfied that the author's claims were compatible with the rights protected by the Convention, under rule 91 (c) of the rules of procedure.

6.3 The author had alleged a violation of article 5 (a) of the Convention by those administrative and judicial organs seized of his case. The Committee did not share the State party's argument that this claim was incompatible with the provisions of the Convention, since to declare it admissible would amount to a review of the determination of facts and law by Australian tribunals. Only an examination on the merits would allow the Committee to determine whether the author was treated by these organs in any way different from any other individual subject to their jurisdiction. The same consideration as in paragraph 6.2 above in fine applied.

6.4 Finally, the State party had claimed that the author could have appealed the judgement of the EOT of 30 October 1995 to the Supreme Court of New South Wales, and could have availed himself of the opportunity to have the decisions of the LAC to deny him legal aid by the Legal Aid Review Committee. The Committee considers that even if this possibility still remained open to the author, it would be necessary to take into account the length of the appeal process; as the consideration of the author's grievances took in excess of two years before the ADB and the EOT, the circumstances of the present cased justified the conclusion that the application of domestic remedies would be unreasonably prolonged, within the meaning of article 14, paragraph 7 (a), of the Convention.

6.5 Accordingly, on 19 August 1997 the Committee declared the communication admissible.

State party's observations on the merits

A. Observations concerning author's claims under article 2 of the Convention

7.1 In a submission dated 3 August 1998 the State party argues, with respect to the author's claims under article 2 of the Convention, that article 2 deals with the general observations of State parties to condemn racial discrimination and to pursue policies of eliminating all forms of racial discrimination and promoting interracial understanding. Any rights which may arise under article 2 of the Convention are also general rights which are accessory in nature and linked to the specific rights enshrined in the Convention. Accordingly, a violation of article 2 may only be found once a violation of another right has been established. Since no other violation of the Convention has been established, as submitted below, the author's allegations with respect to article 2 are without merit. Furthermore, the allegation that the State party has violated the rights of the author under article 2 of the Convention is incompatible with the role of the Committee on the ground that the Committee has no jurisdiction to review the laws of Australia in the abstract.

7.2 If the Committee is of the view that the rights under article 2 of the Convention are not accessory in nature, then the State party submits, in the alternative, that the allegations lack merit. The laws and policies of the Australian Government are designed to eliminate direct and indirect racial discrimination and to actively promote racial equality. Anti-discrimination legislation, policies and programmes exist at both the federal and the State and Territory level to ensure that all individuals are treated on the basis of racial equality and to ensure an effective means of redress if racial discrimination occurs. The laws, practices and policies in relation to the NSWFB, the ADB, the EOT, the Ombudsman and the LAC fully conform with Australia's obligations under the Convention. The author has provided no evidence that the NSWFB, the ADB, the EOT, the Ombudsman and the LAC engaged in acts or practices of racial discrimination against him.

B. Observations concerning alleged violations of the Convention by the New South Wales Fire Brigade

7.3 The author's allegations that his rights under the Convention were violated by the NSWFB concern three different issues: his appointment, conditions during his employment and the termination of his employment.

7.4 The author alleges that he was discriminated against by not being appointed to the position of Facilities Management Officer or Service Manager, for which he had applied, because his overseas qualifications and experience were not taken into consideration. The State party describes the process leading to the fulfilment of those posts and states that the author's academic qualifications were not at any stage disregarded nor devalued; however, he lacked the experience required, in particular local experience. He was granted an interview for the position of Service Manager, during which he did not demonstrate that he had sufficient relevant experience or sufficient knowledge and understanding of the duties and requirements of the position.

7.5 The unsuccessful applications were destroyed in December 1993, in accordance with the NSWFB policy to retain applications for 12 months only. The author first raised a complaint over the selection process when he made his complaints to the EOT in 1995. Prior to this, his complaints had been restricted to work-related issues.

7.6 The author did not apply initially for the three vacant positions of Engineering Officer. However, the selection committee contained some common membership with the selection committee for the service manager communications position. Recognizing that the author met all the requirements for one of the three positions, he was invited to submit a late application. He submitted an application on 21 December 1992 and on 28 January 1993 he was recommended for appointment on probation.

7.7 Regarding the claim that one of the other two engineering officers was getting more salary than the author the State party indicates that the reason was that the said officer had already been in the Public Service for some time.

7.8 As to probation, the usual practice is to appoint persons on probation when first joining the public service. The author had not been advised that his appointment was on probation due to a "systemic error"; the restructure of the NSWFB and subsequent recruitment action had created heavy demands on the personnel area. A number of letters of appointment were sent out around the same time as that of the author's which neglected to mention appointment on probation.

7.9 The EOT judgement, a copy of which was provided by the State party, indicates, in particular: "There is no doubt that Mr. S. was treated differently to his colleagues in relation to his appointment to the position of Engineering Officer, both with respect to his salary and other terms of his employment. The issue is whether this amounts to discrimination on the ground of race. We are of the view, after a careful consideration of all the evidence, that the reason that Mr. S. was treated differently was that Mr. S. did not have sufficient local experience. In our view this does not amount to discrimination on the ground of race. The failure of the Respondent to inform Mr. S. that he was only appointed for a probationary period was unfortunate. Without doubt Mr. S. had ground for complaint in relation to his appointment. His contract was breached at the outset. That is not a matter for us to redress. He was probably exploited. But he was not discriminated against unlawfully. Whilst he has been treated adversely, it was not on the ground concerning his race or a characteristic of his race or a characteristic imputed to his race."

7.10 The EOT found that, while the author's supervisor had a "robust approach" to the work to be done by those within his section, he did not treat the author differently to anyone else in the section, nor was the author treated differently from his colleagues to any marked degree with reference to the tasks assigned to him.

7.11 The author had access to workplace information in the same manner as other officers. All files were available to him and he was provided with all information relevant to the projects for which he was responsible. In relation to business trips he was treated in the same manner as the other engineering officers. The author was not segregated from his colleagues on a trip to Melbourne. He did not participate in that trip because his presence was not required. As for his exclusion from the external training course on Fleet Mobile Communication in June 1993, it was due to financial constraints and his lack of seniority. As to training opportunities, the allegation appears to relate to a course for MS Projects/Windows that the other engineering officers attended while the author did not. However, the author attended an Excel computer training course. Further, the EOT found that the NSWFB was justified in excluding the author from both the business trip to Melbourne and the Fleet Mobile Communication course, due to his lack of seniority and the need to avoid unnecessary expenditure of public funds.

7.12 When the author complained that his workload was too high, this was reviewed but not considered to be the case by his supervisors. He was granted an extension to complete a project on at least one occasion in response to his request. The EOT found it correct that at one stage the author had five projects assigned to him while his colleagues had two each. However, an analysis of the tasks assigned to the latter showed that they were of substantially greater complexity and scope that those assigned to the author. Moreover, the EOT did not accept the author's case that he was required to attend to duties of contract administration that were of higher accountability than those of his colleagues. Material tendered by the NSWFB indicated that at various times throughout their employment all three were required to attend to duties of contract administration and consideration of vendor submissions.

7.13 Several comments alleged to have been made by the author's colleagues were carefully evaluated by the EOT, which concluded that they were isolated remarks made on purely social occasions and did not reflect any vilification or a basis for finding of racial discrimination.

7.14 Regarding the termination of the author's employment the State party submits that it was primarily due to the fact that he refused to do certain work, was unable to maintain good work relationships and created disruptive tension in the workplace by accusations against staff members. Furthermore, all three engineering officer positions were re-described and re-advertised in December 1993. The process commenced in May 1993, i.e. before the author made his complaints of 13 and 19 July 1993. His two colleagues were appointed to two of the re-described positions. The author did not apply.

7.15 The author alleges that he lodged two complaints of discrimination which were not investigated by the NSWFB according to their grievance policy. Although it is clear that the complaints were not investigated strictly according to the NSWFB grievance policy, this does not, of itself, indicate that the author was victimized. However, it appears to have contributed to the finding by the EOT that the author had been victimized. It was the author's continued insistence that he would not carry out certain duties unless he was paid engineers' rates which

was the primary factor which led to the Director General's decision to annul his probationary appointment. Another factor was that, although his annulment depleted the resources of the communications unit at a time of great activity and change, the Director General was aware that the author's continued presence was creating disharmony and adversely affecting the work performance of all involved. All officers in the Unit had become increasingly concerned that their every action and conversation was being scrutinized by him and recorded in a manner not consistent with workplace harmony.

7.16 The EOT considered that the author's complaints of racial discrimination significantly hardened his superior's views of him and were "a substantial and operative factor" upon the NSWFB adopting the view that he should be dismissed rather than seeking to resolve the issue by resorting to a grievance procedure. It also considered that although the NSWFB had stated, in a letter to the President of the ADB, that the author was dismissed because he refused to do certain work, the NSWFB had "subjected" the author "to a detriment, namely to termination of his employment without notice" because of his disciplinary allegations: this, in the tribunal's opinion, was contrary to Section 50 of the Anti-Discrimination Act 1977.

7.17 The State party concludes that the author has not provided any evidence that could justify his claims that the NSWFB violated articles 5 (c) and 5 (e) (i) in his appointment, during the course of his employment and the termination of his employment. As noted above and consistent with the evidence before the EOT, the selection committee concerned with the author's appointment to the NSWFB placed an emphasis on relevant local experience. This was on the basis that the engineering conditions and practices in Australia in relation to which the author was employed are significantly different to those conditions and practices in which the author had previously operated. For this reason the author's starting salary was $A 2,578.00 less than that of his colleagues. The EOT also found that there was no racial discrimination in relation to any aspect of the author's employment.

7.18 In the NSWFB and throughout every jurisdiction in Australia there are no restrictions to access to public service on the basis of race, colour, descent or national or ethnic origin. The New South Wales Government - like all jurisdictions throughout Australia - has a policy of Equal Employment Opportunity which actively encourages the recruitment of, inter alia, people from other than English-speaking backgrounds into the public service.

7.19 The State party submits that the communication does not raise an issue under article 3 of the Convention in relation to any aspect of his employment with the NSWFB, since there is no system of racial segregation or apartheid in Australia. It also submits, in relation to the author's allegations that the NSWFB failed to investigate his complaints according to the official grievance policy, that the author has not provided any evidence that the investigation of his grievance by his superiors at the NSWFB was an ineffective way to provide him with protection and remedies.

7.20 The State party reiterates that it is not the function of the Committee to review the findings of the EOT. That submission is based on jurisprudence of the Human Rights Committee in deciding cases under the Optional Protocol to the International Covenant on Civil and Political Rights. It is also analogous to the well established "fourth instance (quatrième instance)" doctrine of the European Court of Human Rights, that an application that merely

claims that a national court has made an error of fact or law will be declared inadmissible ratione materiae. The evidence provided in the transcript of the hearing before the EOT and the EOT's judgement shows that the author's allegations were carefully considered within the meaning of racial discrimination under the Anti-Discrimination Act, which in turn reflects the terms of the Convention, and were found to be unsubstantiated.

C. Observations concerning alleged violations of the Convention by the Anti-Discrimination Board, the Equal Opportunity Tribunal, the Ombudsman and the Legal Aid Commission

7.21 Regarding the author's complaint vis-à-vis ADB the State party submits that the author has failed to provide any evidence to demonstrate a casual connection between the ADB's acts and the alleged discrimination he suffered at work. When he lodged a complaint with ADB on 30 July 1993 he was already aware that he was about to lose his job. Accordingly, it could not have been "as a result" of the ADB's behaviour that the author allegedly suffered discrimination, hostile behaviour and lost his job. As for the complaint that ADB did not apply for an interim order to preserve his rights the State party contends that the power in section 112 (1) (a) to preserve the status quo between the parties does not extend to preserving a complainant's employment.

7.22 As to the allegation that the ADB did not act promptly, it is submitted that an ADB officer spoke with NSWFB on 10 August 1993 and asked if the NSWFB would delay the decision to dismiss the author until the ADB had investigated his complaint. The ADB had no power under the Anti-Discrimination Act to compel the NSWFB to reinstate the author. After the author advised the ADB that he was not proceeding with an appeal to GREAT because he did not want reinstatement, the matter was no longer considered by the ADB to be urgent, in accordance with the ADB's usual policy. Furthermore, there is no evidence that the ADB did not act impartially in considering the author's complaints. Indeed, it is clear from correspondence from the ADB and the Ombudsman that the conciliation officer complied with the ADB's usual procedures.

7.23 The author twice complained about the conduct of the ADB in investigating his complaint to the New South Wales Ombudsman. Each of the author's complaints was declined. The Ombudsman informed the author that he was declining to investigate the author's urgent complaint about the alleged delay of the ADB because he considered that the ADB had adhered to its usual procedure for dealing with urgent complaints. The State party submits that the author's claim against the ADB is manifestly ill-founded and lacking in merit.

7.24 As for the author's allegations concerning the EOT's handling of the hearing, the State party submits that it would appear from the transcript that, as is often the case with proceedings involving unrepresented persons and all the more so where the particular tribunal's raison d'être is the elimination of discrimination, the EOT went to great lengths to be fair to the author. The author obtained a fair and relatively long hearing (the proceedings took five days). In particular, the transcript indicates that the EOT:

- was very polite at all times to the author and assisted him with questions;

- granted the author leave to be assisted by a friend;

- invited him "not to hurry, there was plenty of time";

- protected him when giving evidence and allowed a witness to be recalled at the author's request;

- allowed the author to cross-examine one of the NSWFB's witnesses for almost a whole day;

- on many occasions tried to assist the author to explain why events and actions were or were not based on race.

7.25 The author has failed to provide any evidence that the proceedings were unfair, or motivated or tainted in any way by racial discrimination, or that the EOT judgement was unjust. Accordingly, the proceedings before the EOT were neither in violation of article 5 (a) nor ineffective within the meaning of article 6.

7.26 Regarding the author's claim with respect to the Ombudsman, the State party explains that the author made two complaints in writing to the Ombudsman about the handling of his case by the ADB. The Ombudsman's Office declined to investigate because the author had alternative means of redress before the EOT. As explained to the author, because of the high number of complaints and the limited resources available to the Ombudsman to investigate them, priority is given to those matters which identify systemic and procedural deficiencies in public administration, where complainants have no alternative and satisfactory means of redress. The author's allegation that a government department "can get away with it" if there is an alternative means of redress available to the victim is illogical. If there is an alternative means available then the government department "cannot get away with it".

7.27 Furthermore, there is absolutely no evidence to support the allegation that the Ombudsman "colluded" with ADB officials. The preliminary inquiries undertaken by the Ombudsman disclosed that the conduct of the relevant ADB officer complied with the usual ADB procedure. In the absence of prima facie evidence of misconduct on the part of the ADB, the Ombudsman had no alternative but to decline to investigate the author's complaint. No amount of consultation with the author would have altered this fact.

7.28 In a letter dated 26 April 1995 the author wrote to the Ombudsman seeking a review of the decision. In that letter he had the opportunity to raise his specific objections to the decision to decline his complaint. He did not do so and merely reiterated his earlier complaint and outlined developments in the hearing of this matter by the EOT.

7.29 There has been no evidence submitted by the author that the decision of the Ombudsman was motivated or tainted by racial discrimination in violation of article 5 (a), or that this remedy was ineffective within the meaning of article 6.

7.30 As for the author's claims regarding the decision of the LAC to refuse his application for legal aid, the State party argues that the decision was made in accordance with the Legal Aid

Commission Act and the Legal Aid Policy Manual, in a manner which treated the author no differently to any other person making an application for legal aid. The author was advised by the LAC that legal aid was not available for any person in respect of matters before the GREAT. The refusal of legal aid did not preclude the author from accessing and effectively conducting proceedings before GREAT. This body is designed to be used by unrepresented persons. Finally, it was the author's choice to pursue his complaint through the ADB and withdraw his proceedings before the GREAT, since he was not interested in reinstatement. Accordingly, the author has failed to provide any evidence that he was treated unfairly by the LAC in relation to his application for aid for legal representation before GREAT, or that lack of legal aid was the determinative factor in his decision to pursue a remedy through the ADB.

7.31 If the matter is one for which legal aid is available and the means test is satisfied, but there is some doubt concerning the merit, then, in accordance with the Legal Aid Commission Act, the LAC may cover the cost of obtaining an opinion from junior counsel on whether the applicant has reasonable prospects for success. On 28 March 1995, the LAC authorized the author to seek an opinion from junior counsel as to whether the proceedings before the EOT had reasonable prospects for success and the likely quantum of damages that might be awarded to the author. The solicitor's expenses were paid by the LAC. However, it was finally found that the author's application did not satisfy the LAC's merit test. The author has failed to demonstrate how the LAC's decision to refuse him legal aid on the basis that his claim lacked merit was unfair or amounted to unequal treatment.

7.32 The author was advised in writing in respect of the refusal of his application for legal aid to appear before the GREAT and of his application for legal aid to appear before the EOT that he could lodge an application to have each of these decisions reviewed by a Legal Aid Review Committee within 28 days. The author states that it was impossible for him "to comply with the EOT hearing dates and complete the LAC's appeal process. The LAC explicitly informed the author of section 57 of the Legal Aid Commission Act which provides for the adjournment of proceedings by a court of tribunal pending the determination of an appeal by the Legal Aid Review Committee. The author did not lodge an appeal to the Legal Aid Review Committee in respect of either decision to refuse his applications for legal aid. The fact that the LAC advised the author of his right of appeal is further evidence that he was treated fairly.

7.33 The author's claim against the LAC is manifestly ill-founded and lacking in merit. The author has failed to provide any evidence that the LAC decisions to refuse the author legal aid for representation before GREAT or EOT were unfair or motivated or tainted in any way by racial discrimination, and therefore in violation of article 5 (a), or that this remedy was ineffective within the meaning of article 6.

Author's comments

A. Allegations concerning violations of the Convention by the New South Wales Fire Brigade

8.1 With respect to the fact that the author was not appointed to two positions for which he had applied he disagrees with the State party's argument that understanding of the local market was an essential criterion advertised or mentioned in the description for the position of Service

Manager and states that during his employment he was given several tasks of local contract market and purchase. His application showed his skills and experience to carry out all the accountabilities mentioned in the job description for the two positions. Furthermore, he was more suitable than the person appointed as Service Manager, as he had a postgraduate training course in maintenance management and six years of experience in the management of emergency services communication. During his employment the author was assigned with one task of the Service Manager's position, i.e. the purchase of Test Analyser. He was less favourably treated on the ground of his racial background in that he was not even granted interview for both positions. Furthermore, it is not correct that he only complained over the selection process when he filed a complaint with the EOT in 1995. He did raise the matter with his submission of 15 December 1993 to the ADB.

8.2 The author does not fully agree with the State party's statement regarding the steps that led to his appointment as an engineering officer. As for his remuneration, he says it is not true that one of his two colleagues received the same salary as him. The EOT found that the colleague also received allowances by reason of being placed on a special "on-call" roster which gave him additional salary and permanent access to a car.

8.3 As for the probation issue the author argues that under section 28 (2) of the Public Sector Management Act, a person may be appointed to a position in the Public Service without being required to serve a probation period. Given his qualifications, skills and experience he could have been exempted from probation. The reason for not being exempted was based on racial considerations.

8.4 Concerning the workload he says that he had to work during the Easter holidays in order to complete a project that, given its complexity, took longer than what his supervisors suggested. He also says that his supervisor treated the migrant staff as second class citizens and that his regret and denial of discriminatory intent is untrue.

8.5 The author insists that he was segregated from the white officers on a trip to Melbourne in connection with a project he was working on and, for which, he had previously been sent to Sydney. As for training, the Fleet Mobile Communications course dealt with the latest technologies in mobile radio communication. He was the most deserving employee of the NSWFB for his course, as he was made responsible for the radio communications projects. The cost of the course was not very high.

8.6 As for the State party's statement that the author did not apply when the position was re-advertised he states that, by then, he had already been dismissed. Applying would have meant that he had to compete, as an external candidate, with hundreds of other applicants. Furthermore it would have been useless. As the EOT found, the NSWFB was unwilling to employ him.

8.7 As for the State party's claim that the author had refused to carry out work assigned to him the author refers to the EOT judgement in which the tribunal was of the view that the incidents referred to by his superiors did not amount to clear refusal by the author. He also states that he did not refuse the lawful order or requested engineer's pay; the State party's allegations

that he refused duties for money are baseless. With regard to the workplace harmony and productivity, there was no complaint against the author from any staff member, neither did EOT find that there was any evidence that he created disruptive tension in the workplace.

B. Allegations concerning violations of the Convention by the Anti-Discrimination Board, the Equal Opportunity Tribunal, the Ombudsman and the Legal Aid Commission

8.8 The author states that when he requested the ADB to deal with his case on an urgent basis, as he feared he would be dismissed, the ADB limited itself to inform the NSWFB that a complaint had been lodged. ADB did not act promptly and deliberately delayed action until the dismissal took place. The author also argues that the ADB was unwilling to investigate his claims regarding "discrimination in appointment", in an attempt to minimize his prospects of success in the EOT and in seeking legal aid; indeed, the ADB's baseless findings that the author's complaint was lacking in substance undermined his prospects of success with other organs.

8.9 The author complains about the manner in which the EOT handled his case. He says, for instance, that it did not order the ADB to provide an officer to assist the inquiry, despite the fact that it could have done so under the provisions of the Anti-Discrimination Act; during the conduct of the inquiry the EOT gave advantage to the NSWFB; it further disadvantaged the author by conducting the hearing in public, reporting to the media and publishing the judgement; enormous amounts of duplicated documentation was given to him to read during the hearing, however, he was not given extra time to read it, except for a few minutes adjournment; the transcripts of the five-day hearing show that he did not have sufficient time to cross-examine the six NSWFB witnesses; two of the witnesses brought by the NSWFB were migrants whose testimony in the witness box did not fully coincide with their affidavits; the EOT allows the NSWFB to be represented by the Crown Solicitor against the unrepresented author without witnesses.

8.10 In its judgement the EOT justified the treatment of the author by the authorities as "unfair", "unfortunate", "exploitation", "adverse", etc., but failed to acknowledge the discriminatory impact and outcome on the author due to his different race to others in similar circumstances. The EOT failed to recognize the continuous pattern of unequal treatment between the author and the other two officers in the same circumstances and considered that the race based harassment in the workplace during duty hours were simple jokes on social occasions.

8.11 The author claims that his personnel file with the NSWFB was taken over by the EOT and he was not allowed to inspect it. The EOT judgement indicates that his personnel file contained a letter dated 4 May 1993 according to which he should be considered for further promotion at the end of his first year of employment. The author expressed doubts as to the authenticity of that letter and considers that it was "planted" by the EOT to justify its judgement that the NSWFB did not discriminate against him on racial grounds.

8.12 The author states that the Ombudsman abused her discretionary powers by declining to investigate his complaints and deliberately misinterpreting section 13 of the Ombudsman Act, despite the fact that the author had identified systemic and procedural deficiencies in the ADB.

She did not answer as to why she did not investigate the wrongdoings of the ADB officials. The Ombudsman was deliberately not understanding that in one instance the ADB "got away" by colluding with the NSWFB and declaring that the author's claim of victimization lacked substance. The victimization claim was later substantiated and NSWFB paid the damages, not the ADB. After receiving two complaints against a public administration, it is unfair that the Ombudsman was relying on the information or advice supplied by the same public administration and reporting it back to the author. The author sent a letter to the Ombudsman, dated 26 April 1995, in which he explained in detail the types of improper conduct by the ADB official. Furthermore, the Ombudsman failed to advise the author as to the kind of additional information she needed to reopen the case.

8.13 The author states that the report of the LAC's sponsored counsel and the LAC's decision to refuse legal aid were unfair, as the author was successful in establishing his case of victimization in the EOT. It is incorrect to say that the author had to choose ADB instead of GREAT because he was not interested in reinstatement. If he was not interested in reinstatement, why did he seek reinstatement through EOT? The real reason for his withdrawal from the GREAT appeal was the denial of legal assistance.

8.14 Finally, the author disagrees with the State party's observations regarding non-violation of article 2 of the Convention. He refers to the Committee's opinion on communication No. 4/1991, in which it is stated that "the Committee cannot accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention".[1]

Examination on the merits

9.1 The Committee has considered the author's case in the light of all the submissions and documentary evidence produced by the parties, as required under article 14, paragraph 7 (a), of the Convention and rule 95 of its rules of procedure. It bases its findings on the following considerations.

9.2 The Committee notes that the author's claims were examined in accordance with the law and procedures set up by the State party to deal with cases of racial discrimination. It notes, in particular, that the complaint was examined by the New South Wales Anti-Discrimination Board (ADB) first and by the Equal Opportunity Tribunal (EOT) on appeal. The EOT examined the author's claims regarding racial discrimination and victimization concerning his appointment, employment and dismissal. On the basis of the information at its disposal, in particular the text of the EOT's judgement, the Committee is of the opinion that the EOT examined the case in a thorough and equitable manner.

9.3 The Committee considers that, as a general rule, it is for the domestic courts of State parties to the Convention to review and evaluate the facts and evidence in a particular case. After reviewing the case before it, the Committee concludes that there is no obvious defect in the judgement of the EOT.

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[1] CERD/C/42/D/4/1991, para. 6.4.

10. In the circumstances the Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of the Convention by the State party.

11. Pursuant to article 14, paragraph 7 (b), of the Convention, the Committee suggests that the State party simplify the procedures to deal with complaints of racial discrimination, in particular those in which more than one recourse measure is available, and avoid any delay in the consideration of such complaints.

F. Communication No. 8/1996

Submitted by: B.M.S. [represented by counsel]

Alleged victim: The author

State party concerned: Australia

Date of communication: 19 July 1996 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 12 March 1999,

Having concluded its consideration of communication No. 8/1996, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1. The author of the communication is B.M.S., an Australian citizen since 1992 of Indian origin and a medical doctor. He claims to be a victim of violations of the Convention by Australia. He is represented by counsel.

The facts as submitted by the author

2.1 The author graduated from Osmania University (India). He holds a diploma in Clinical Neurology (DCN) from the University of London. He has practised medicine in England, India, Ireland and the United States. For 10 years he has worked as a medical practitioner under temporary registration in Australian public hospitals.

2.2 The author states that doctors trained overseas who have sought medical registration in Australia have to undergo and pass an examination involving two stages, a multiple choice examination (MCQ) and a clinical examination. The whole process is conducted by the Australian Medical Council (AMC), a non-governmental organization partly funded by the Government.

2.3 In 1992, the Australian Minister of Health imposed a quota on the number of doctors trained overseas who pass the first stage of this examination. As a result, doctors who were trained abroad and who are Australian residents and Australian citizens may not be registered precisely because they fall outside the quota. On the other hand, quota places may be allocated to persons without any immigration status in Australia.

2.4 Following the imposition of the quota system the author sat the MCQ examination on three occasions. He satisfied the minimum requirements but was always prevented, by the quota system, from proceeding to the clinical examination.

2.5 In March 1993, the author filed a formal discrimination complaint with the Australian Human Rights and Equal Opportunity Commission (HREOC) against the quota and the examination system. In August 1995, the Commission found the quota policy unlawful under the Australian Racial Discrimination Act, considering it "grossly unfair, resulting in unnecessary trauma, frustration and a deep sense of injustice". As regards the examination system, the Commission held that the decision to require the author to sit for and pass examinations was not based on his national origin or on the consideration that he was a person not of Australian or New Zealand origin.

2.6 The Australian Government and the AMC appealed the decision of the HREOC. On 17 July 1996, the Federal Court of Australia ruled in their favour, finding that the quota and the examination system were reasonable.

2.7 The author did not appeal this decision to the High Court of Australia. According to counsel the appeal to the High Court is not an effective remedy within the meaning of article 14, paragraph 7 (a), of the Convention. On the one hand, there is no automatic right of appeal to the High Court, since the Court must first grant special leave to appeal. On the other hand, the High Court has consistently stated that a prima facie case of error will not of itself warrant the granting of an application for leave to appeal. There must be some special feature which warrants the attention of the Court, with its public role in developing and clarifying the law and in maintaining procedural regularity in the lower courts, outweighing the private rights of litigants.

2.8 Furthermore, the author did not have the means to pursue the appeal without being awarded legal aid, and a cost order would be imposed on him if the appeal was unsuccessful. In fact, on 28 October 1996 Legal Aid advised that it would not fund the author's appeal to the High Court.

2.9 In subsequent submissions counsel indicates that following HREOC's decision and notwithstanding that an appeal had been lodged, the AMC decided to abandon the quota. As a result all overseas-trained doctors (OTDs) who, like the author, have met the minimum requirements of the MCQ examination but have been prevented from doing so by the quota, are now allowed to undertake the clinical examination. The author has attempted the clinical examination on several occasions. The examination has three components and it is necessary to pass all the components at the one sitting. The author has passed each component at least once but not all three at the same sitting.

2.10 The standard of the AMC examination is supposedly that of an Australian-trained medical student who is about to commence an intern year. Counsel states that it is objectively preposterous that a person of the author's experience, with 13 years working as a doctor and 8 years in the Australian health system, is not at least of the standard of a newly graduated medical student.

2.11 Studies on Australian medical graduates show serious deficiencies in clinical skills. For example, a University of Queensland study published in 1995 indicates that at the commencement of the intern year, medical staff did not consider all graduates competent even in history-taking and clinical-examination skills and most graduates were not considered competent in such areas as diagnosis, interpreting investigations, treatment procedures and emergency procedures. At the conclusion of the intern year, only 45 per cent of medical staff considered all interns competent at history-taking and only 36 per cent of medical staff considered all interns competent at physical examination. In view of such studies, it is clear that overseas-trained doctors are examined at a higher standard than Australian graduates. In the author's case, the fact that the AMC persistently fails him raises the additional question of whether he is being penalized for taking his case to the HREOC.

The complaint

3.1 Counsel claims that both the AMC examination system for overseas doctors as a whole and the quota itself are unlawful and constitute racial discrimination. In this respect the judgement of the Federal Court of Australia condones the discriminatory acts of the Australian Government and the AMC and thereby reduces the protection accorded to Australians under the Racial Discrimination Act. At the same time, it eliminates any chance of reform of this discriminatory legislation.

3.2 Counsel contends that the restrictions to practise their profession imposed on overseas-trained doctors before they can be registered aim at limiting the number of doctors to preserve the more lucrative areas of medical practice for domestically trained doctors.

State party's preliminary submission and author's comments thereon

4.1 In a submission dated 7 January 1997 the State party informs the Committee that in October 1995 the AMC decided to discontinue the quota system following the HREOC's conclusion that the system was racially discriminatory. That decision was taken in spite of the Federal Court's ruling that the quota system was reasonable and not racially discriminatory. As a result, the 281 candidates who had fallen outside the quota, including the author, were informed that they were eligible to undertake the clinical examinations.

4.2 The State party notes that the author has sat the AMC clinical examination and failed it three times. As a result of the HREOC's decision in the author's case an independent observer appointed by the author was present during his first two attempts. Under the current AMC regulations, he may resit the clinical examination in the next two years, without having to resit the MCQ examination. Currently, there is no restriction, other than satisfactory performance, on the author's progress through the AMC examinations.

4.3 With respect to counsel's allegation that the Federal Court ordered the author to pay the legal costs of the AMC, the State party informs the Committee that in November 1996 the AMC agreed to discontinue pursuit of costs against the author. The Federal Court had made no order for costs in respect of the Commonwealth of Australia, which agreed to bear its own costs.

4.4 In the light of the above the State party considers the author's complaint to be moot.

5.1 In his comments, counsel informs the Committee that the author does not wish to withdraw his communication. He notes that although the quota system was discontinued it may be reintroduced at any time in the light of the Federal Court's ruling which overturned the HREOC's decision. According to counsel the State party authorities have indeed contemplated the possibility of reintroducing it.

5.2 Counsel reiterates that the discontinuation of the quota has not solved the problem of discrimination, since the AMC has simply increased the pass criteria to compensate for the absence of the restrictive effects of the quota. He further claims that although the author has been allowed to proceed to the clinical examination he was failed on each occasion, in circumstances which suggest that he is being penalized for having originally complained to the HREOC. He has lodged a further complaint with the Commission about this issue.

5.3 Furthermore, the fact that a discriminatory practice has been discontinued does not change its previous discriminatory nature or render void complaints concerning its application and operation when it was still in force. Consequently, it is argued that the author's rights were violated from 1992 to 1995, causing him a detriment which has not been redressed by the discontinuation of the quota system.

The Committee's admissibility decision and State party's comments thereon

6.1 During its fifty-first session the Committee examined the communication and noted that the main issues before it were: (a) whether the State party had failed to meet its obligation under article 5 (e) (i) to guarantee the author's right to work and free choice of employment; and (b) whether the order of costs against the author by the Federal Court violated the author's rights under article 5 (a) to equal treatment before the courts.

6.2 On 19 August 1997 the Committee adopted a decision by which it considered the communication admissible with respect to the claim relating to the discriminatory nature of both the AMC examination and its quota system. The Committee noted, inter alia, that the Federal Court's decision provided a legal basis for the reintroduction of the quota system at any time. The Committee did not share the State party's reasoning that since the quota system had been discontinued, the author's complaint for the discrimination alleged to have taken place between 1992 and 1995 had become moot. In respect of the fact that the author did not appeal the Federal Court's decision to the High Court of Australia, the Committee considered that even if this possibility were still open to the author, and taking into account the length of the appeal process, the circumstances of the case justified the conclusion that the application of domestic remedies had been unreasonably prolonged.

6.3 The Committee declared the case inadmissible as to the author's complaint that he was discriminated against because the pass criteria had been raised, since that matter had been submitted to the HREOC and therefore domestic remedies had not been exhausted. It also considered the case inadmissible as to the author's claim that costs ordered by the Court against him constituted discrimination, in view of the State party's information that the AMC would not be pursuing further the costs imposed by the Court.

6.4 By letter dated 24 December 1997 the State party informed the Committee that its submission of 17 January 1997 contained a request for advice on whether the communication was ongoing. This request was made because the alleged victim had effectively received a remedy as a result of the Government's decision to lift the quota. This request did not constitute the State party's pleadings on admissibility and was not submitted under rule 92 of the Committee's rules of procedure. The submission clearly indicated that if the Committee decided to proceed with its consideration of the author's complaint the State party would like to be given the opportunity to make submissions on the admissibility and merits of the communication. The State party also indicated that it had never been advised that the author had declined to withdraw his complaint.

6.5 By letter dated 11 March 1998 the Committee informed the State party that rule 94, paragraph 6, of the Committee's rules of procedure provides for the possibility of reviewing an admissibility decision when the merits of a communication are examined. Accordingly, the Committee would revisit its earlier decision on admissibility upon receipt of relevant information from the State party.

State party's observations on admissibility and merits

7.1 The State party submits that the author's interpretation of the requirement imposed on overseas-trained doctors such as himself to sit written and clinical examinations to demonstrate competence is incorrect. The author is not subject to the system of examinations because of his (Indian) national origin, but because he has trained at an overseas institution. All OTDs, regardless of national origin, are required to sit the examinations. The objective of the examination process is to establish that medical practitioners trained in medical institutions not accredited formally by the AMC have the necessary medical knowledge and clinical competence for the practice of medicine with safety within the Australian community. Its standard is the level of attainment of medical knowledge and clinical skills corresponding to that required of newly qualified graduates of Australian medical schools who are about to commence intern training. The author has sat the MCQ examinations on a total of six occasions. His first three attempts predated the introduction of the quota in 1992. On each occasion, he failed to reach the "pass mark". After the introduction of the quota in 1992, the author sat the MCQ examination a further three times. Whilst succeeding in obtaining a "pass", he did not come within the top 200 candidates passing the MCQ and so was unable to proceed to the clinical examination. When the quota was discontinued, the author was permitted to sit for the clinical examination in March 1996, August 1996, October 1996 and March 1997. On each occasion he failed to demonstrate sufficient proficiency in each of the subject areas to be granted registration. He currently is on the waiting list to sit the clinical examination again.

7.2 The State party submits that the scheme, in general and in its application to the author, does not represent a breach of Australia's obligations under article 5 (e) (i). The underlying basis of the author's complaint is that OTDs, particularly those who have "proven competence" through practice in Australian public hospitals, should be similarly placed to doctors trained in AMC-accredited schools. In the view of the Australian Government, however, graduates of overseas universities and those from Australian and New Zealand universities cannot be accepted as having equal medical competence without further investigation. Educational standards vary across the globe and the Australian Government is justified in taking account of this difference in devising schemes to test the comparability of standards. To accept the author's complaint would be to engage in a circular argument which prejudges the question of equivalence of standards, a matter which the Australian Government is entitled to question. The scheme in fact ensures equality of treatment.

7.3 Furthermore, the State party does not accept that working in Australian hospitals under temporary registration is necessarily sufficient proof of competence to justify the waiving of examination requirements. When working under temporary registration, overseas-trained doctors are subject to strict supervision and practice requirements and may not be exposed to the broad range of medical conditions which exist in the Australian community. Satisfactory performance under such restricted conditions does not equate with sufficient knowledge and competence over the range of areas of permitted practice under general registration.

7.4 The requirement that OTDs sit for and pass AMC examinations is not based on national origin. The distinction made is on the basis of the identity of the medical school, regardless of the national origin (or any other personal characteristic) of the candidate seeking registration. In practice, no matter the race or national origin of a candidate, that candidate must fulfil the same requirements: either graduation from an accredited medical school or the completion of AMC exams to demonstrate an equal level of competence to those who have successfully graduated from an accredited medical school. Thus, for instance, if a person of Indian national origin studied overseas, he/she would have to sit the AMC exams. If he/she studied in Australia, he/she would be entitled to proceed straight to an internship. Similarly, whether a person is of English national origin, Australian national origin, Indian national origin or any other national origin, the requirements remain constant.

7.5 Furthermore, despite the author's implication that the AMC has deliberately chosen not to accredit overseas medical schools for reasons associated with racial discrimination, there is no evidence to suggest that the system was intended to, or in fact works to, the detriment of persons of a particular race or national origin. Contrary to the author's complaint, the system of AMC examinations does not carry any imputation regarding the attributes of individuals of particular national origins. In particular, the need to sit for such examinations does not imply that doctors trained overseas, whether or not they have been practising in Australia, are inferior because of their race, national or ethnic origin. Instead, it simply sends the message that all graduates of medical schools will be subject to the same standard of examination before being permitted to work unconditionally in Australia.

7.6 The HREOC was satisfied that the accreditation system was not based on race. The AMC's evidence, which the HREOC accepted, was that accreditation was undertaken on the basis of efficient use of resources. The AMC has considered it impractical to investigate for the

accreditation process every university attended by applicants for registration. Given the wide range of countries from which immigrants to Australia come, there is concomitantly an extremely large number of universities all around the world from which OTDs have graduated. The AMC does not have the resources to undertake such an extensive accreditation, nor should it be expected to. The Australian Government supports the reasonableness of the allocation of the AMC's resources to accredit schools with which it has most familiarity and contact. It thus considers an examination to be an equitable system of adjudging standards of competence by persons, regardless of race or national origin. The accreditation of New Zealand medical schools, in particular, is explainable in terms of the mutual accreditation programme carried out by the Australian Medical Council and the Medical Council of New Zealand.

7.7 The State party does not accept the author's allegation that the system privileges Australian and New Zealand doctors and disadvantages doctors trained outside Australia and New Zealand. Even if (for the purposes of argument) such a benefit or disadvantage could be established, such an effect would not constitute discrimination on the basis of "national origin" or any other prescribed ground under the Convention. The group who are privileged under this scenario are those trained in Australian and New Zealand medical schools, rather than persons of particular national origin. Medical students in Australia do not share a single national origin. Similarly, those who are OTDs are not of a single national origin. Whilst the latter group are likely "not to be of Australian national origin", the Australian Government does not accept that such a broad category of persons represents a "national origin" or racial classification for the purposes of article 5 (e) (i). For the purposes of article 5 (e) (i), it would be necessary to demonstrate discrimination on the basis of a person's particular national origin - in this case, the author's Indian national origin.

7.8 The current system of examinations is clearly based on objective and reasonable criteria. It is a legitimate policy objective for the Australian Government to seek to maintain high standards of medical care for its residents and to seek to assure itself of the standards of medical competence of those seeking to work in Australia on an unsupervised basis. Thus, it is reasonable for legislatures to institute a means of supplementary exams for those trained in universities with which it is not familiar to ensure that their competence is at a comparable level to those trained within Australia and New Zealand. That the author would prefer an alternative method of evaluating competence does not detract from the reasonableness of the current system. It is within a State's discretion to take the view which has been adopted - that an examination is the best method to test for overall knowledge. The reasonableness of such a system is also demonstrated by the extent to which similar practices are adopted by other States parties to the Convention, such as the United Kingdom, Canada, the United States and New Zealand.

7.9 The need for doctors to demonstrate their competence could also be regarded as outside the realm of "discrimination" by reason of it being an inherent occupational requirement. Although the Convention does not explicitly mention such an exception, it would seem in keeping with the spirit of the Convention for the Committee to recognize that measures based on the inherent requirements of jobs do not represent discrimination, in a similar way to the recognition of the principle in article 1 (2) of the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation.

7.10 The State party submits that there has been no relevant impairment of the right to work or free choice of employment through the current scheme. The institution of regulatory schemes governing the prerequisites for admission to practise in a particular profession and applying equally to all does not infringe or impair an individual's right to work. Implicit in the author's complaint is that he should have the right to work as a doctor and the right to have his qualifications recognized by the health authorities in Australia without undergoing any form of external examination. In the Australian Government's view, such an argument misunderstands the nature of the internationally recognized right to work.

7.11 Under international law, the right to work does not confer a right to work in the position of one's choice. Instead, by recognizing the right to work, States parties undertake not to inhibit employment opportunities and to work towards the implementation of policies and measures aimed at ensuring there is work for those seeking it. In the current context the Australian Government is not impairing anyone's right to work. In fact, the relevant legislative schemes merely regulate the means of practising a particular profession.

7.12 The system of admission to unrestricted practice does not impair the right of anyone to free choice of employment, let alone persons of a particular national origin. Recognition of a right to free choice of employment is designed to prevent forced labour, not to guarantee an individual the right to the particular job he/she desires. In the present context, there is no servitude or forced labour regime which impairs the choice of employment of doctors of a particular national origin. Instead, there is a system of examinations which permits entry into unrestricted practice.

7.13 Similarly, whilst counsel has attempted to argue that the author is equally placed to Australian doctors in terms of competence and that his experience should be a sufficient demonstration of competence, the State party submits that there is no evidence that doctors of Indian national origin should be treated differently to overseas-trained doctors of other national origins. Nor is there compelling evidence to suggest that the subjection of the author to the AMC examinations is unreasonable and evidence of racial discrimination. Despite counsel's reliance on the author's practice in public hospitals, the State party notes that at all relevant times, the author's practice has been circumscribed by strict supervision and limited practice requirements commensurate with his status as a conditional registrant. The State party would thus reject any implication that his work in Australia demonstrates sufficient competence to warrant automatic general registration.

7.14 The State party denies that the standard of the AMC examinations is higher than that expected of students at Australian and New Zealand medical schools. Steps have been taken to ensure the comparability of the examination system, including: (a) the appointment of a Board of Examiners with broad experience in teaching and examining undergraduates, and therefore familiar with the curricula of Australian university medical schools; (b) the use of a bank of approximately 3,000 MCQ questions mostly drawn from MCQ examination papers of the medical schools of Australian universities and questions specifically commissioned by the AMC from Australian medical schools; (c) the MCQ examination papers are marked by Educational Testing Centre at the University of New South Wales, a major national testing authority which also provides information in relation to the statistical reliability and validity of the questions. If data indicate that a particular question fails as a discriminator of performance, or if there is

evidence to suggest that a question could be misleading, the Board of Examiners is able to delete that question from the examination; (d) instructing both the MCQ and clinical examiners to the effect that the examinations should be directed to establishing whether AMC candidates have the same level of medical knowledge and medical skills as new graduates.

7.15 The past practice of adjustment of raw scores in the MCQ examination does not reflect any racial discrimination, or a racially discriminatory quota. Such adjustment was designed as a method of standardization to prevent unrepresentative results based on the particular examination.

7.16 Other than his particular complaints about his failure to pass the examinations, the author has not advanced any objective evidence to support the non-comparability of the examination standards. The only study produced by the author's counsel merely comments on perceptions of deficiencies in the standard of first year interns, rather than the comparability of the forms of examination to which OTDs and AMC-accredited medical students are subject.

7.17 Quite apart from the nature of the examinations in themselves, the author has failed to make a case that any disparity in standards of the MCQ examinations and standards at AMC-accredited universities has the purpose or effect of discriminating against persons of a particular national origin. When the figures of national origin and success rates in the MCQ are compared, there is no evidence of discrimination against persons of a particular national origin. In particular, there is no evidence that persons of Indian national origin are less likely than persons of other national origin to pass the examination. The State party provides a table of results in the 1994 exams (the last year in which the quota applied), showing that Indian students' success rates in the AMC exams are proportionate to their entry levels in the examinations. Whilst Indian doctors comprised 16.48 per cent of doctors attempting the MCQ examination in 1994, they represented 16.83 per cent of those successfully passing the MCQ examination.

7.18 The author alleges that during the period of the operation of the quota system between July 1992 and October 1995, the exclusion of OTDs such as himself from the AMC clinical examination on the basis of his quota ranking constituted racial discrimination and was a denial of his right to equal enjoyment of the right to work and free choice of employment under article 5 (e) (i).

7.19 When the Australian Health Ministers' Conference (AHMC) resolved to introduce the quota on OTDs in early 1992, the OTDs in the process of undergoing the AMC examinations numbered approximately 4,500, almost four times the number of doctors expected to graduate from Australian medical schools. In the face of such a large number of OTDs seeking to practise in Australia and mindful of the national workforce supply target (set at one doctor per 500 persons), the AHMC adopted a National Medical Workforce Strategy comprising a number of initiatives. One of them was the introduction of a quota on the numbers of OTDs who would be allowed to sit the clinical examination, having passed the MCQ examination. Thus, the AHMC requested the AMC to set a cap of 200 on the number of candidates proceeding annually to the clinical examinations. The request was made on the basis of: (a) the number of doctors needed to service the Australian community to requisite standards; (b) the cost of the provision of medical services under an open-ended funding commitment and the impact on that cost of a

more than optimum number of doctors; (c) the geographic distribution of doctors; and (d) the degree to which the supply of doctors is sufficient to meet the needs of particular community groups and particular specialities.

7.20 The quota was not racially discriminatory in any form. Firstly, it applied to all OTDs regardless of national origin, with persons of a variety of national origins, including Australians, being subject to the requirement. Nor is there any evidence that the quota disproportionately affected persons of Indian national origin. In evidence before the Federal Court, for example, the proportion of doctors of Indian birth gaining entry to the quota was in fact marginally higher than the percentage of doctors of Indian birth attempting the MCQ examination. Furthermore, the quota on doctors trained overseas was complemented by the pre-existing de facto quota on students seeking entry to Australian medical schools.

7.21 Secondly, even if the quota could be considered to have benefited those who have attended Australian and New Zealand medical schools, such persons are not characterized by a national origin. Instead, they would be likely to share citizenship, a factor outside the realm of the Convention.

7.22 Thirdly, even if (for the purposes of argument) the Committee was of the view that the quota represented a distinction on the basis of national origin, the State party would submit that the quota was a reasonable measure, proportionate to meeting the State's legitimate interest in controlling the number of health□care providers and hence was not an arbitrary distinction. Such a purpose is not inconsistent with the Convention and would only infringe the Convention if such policies, designed to deal with the supply of medical professionals, disguised racial discrimination. Whilst the details of the quota were subject to some criticism by the HREOC (in that it did not provide for a waiting list, but required OTDs not initially successful in coming within the annual quota to undergo the examination again), such a factor does not make the quota unreasonable or discriminatory.

7.23 As the State party has previously noted, the quota is no longer in existence and the author has been permitted to sit for the clinical examination on several occasions. He has thus been afforded a remedy, if any was required. The State party's view remains that the subject matter is moot.

7.24 The State party further considers that the author's complaint concerning the application of the quota to all OTDs regardless of citizenship status does not fall within the terms of the Convention. Under article 1 (2) of the Convention States parties are not prohibited from discriminating on the basis of citizenship. Conversely, the imposition of a system which does not take account of citizenship cannot be the basis of complaint under the Convention.

7.25 Furthermore, the State party denies that the judgement of the Federal Court has the effect of reducing the protection accorded to Australians under the Racial Discrimination Act 1975. The issues raised by the author under this allegation relate primarily to the interpretation of domestic legislation which should not be the subject of separate investigation by the Committee. The Racial Discrimination Act 1975 remains an appropriate and effective means of eradicating racial discrimination.

7.26 Finally, the State party notes the author's allegations that Australia continues to act in violation of article 5 (e) (i) on the grounds that the AMC has raised the pass criteria for the clinical examination to compensate for the discontinuation of the quota system. The author alleges that his failure to pass the clinical examination is evidence of this practice and of the fact that he is being victimized for lodging his original complaint with the HREOC in 1995. The State party contends that this complaint continues to be subject to the investigation of the HREOC and thus remains an inappropriate subject for the Committee's examination.

Counsel's comments

8.1 In his response to the State party's observations counsel indicates that unlike other countries where both local graduates and overseas-trained doctors are assessed by sitting exactly the same national licensing examination, in Australia there is a differential system with one regime for overseas-trained doctors and another for Australian graduates. The Australian graduate is assessed by his/her university on the basis of what he/she has been taught. It is primarily an exercise in curriculum recall rather that an assessment of essential medical knowledge and clinical competence. The Australian Medical Council's own witnesses in the author's case before the HREOC have conceded that in undergraduate assessment the aim is to try and pass the student. Indeed, pass rates for final-year medical students in Australian universities are close to 100 per cent. On the contrary, the AMC MCQ examination purports to assess whether a doctor possesses sufficient knowledge for safe practice. In 1995 the Australian Medical Council conducted a trial in which its 1994 MCQ paper was submitted to final-year medical students at Monash University and Sydney University. The results of the trial clearly reveal that a higher assessment standard is applied to OTDs than to Australian graduates and that the quota served to disadvantage overseas doctors when compared to local graduates.

8.2 As regards the AMC clinical examination, the differential nature of the system is even more manifest. The author has attempted the AMC clinical examination on four occasions. On each occasion he has been failed. He lodged a further complaint with the HREOC, which has not issued a decision yet. In the course of the hearing, the true nature of the AMC clinical examination system has been revealed. It has been exposed as a chaotic, unstructured and unreliable assessment tool which, in form and content, departs markedly from the system used to assess students in Australian universities. Moreover, the AMC's own internal working parties have emphasized the inadequacies of its examination system and the need to improve its reliability and validity.

8.3 Counsel provides a table showing pass rates in the AMC clinical examination by country of birth during the period 1995 to 1997. The pass rate for persons born in India is 45.9 per cent, for those born in the Middle East 43.6 per cent and for those born in Asia 43.5 per cent. For those born in the United States or Canada the pass rate is 55.6 per cent, for Western Europe 62.5 per cent, for the United Kingdom and Ireland 77.1 per cent and for South Africa 81.1 per cent. Counsel wonders whether these differential pass rates are merely a reflection of the quality of medical education in the countries in question or whether conscious or unconscious perceptions of racial "compatibility" play a part. It is well established that many people make conscious or unconscious judgements about a person's competence on the basis of race and colour and if an examination system has a format that gives free rein to any prejudices that may exist, then it is not competence alone which determines the result. Counsel also quotes

a number of reports and statements by Australian institutions indicating that the country needs more trained doctors and that the system of accreditation of overseas-trained doctors is unfair and discriminatory.

8.4 With respect to the quota system, counsel argues that the quota was a quantitative control designed to shut out a number of overseas-trained doctors not because they were trained overseas but because they were from overseas. There is a close correlation between place of birth and place of training in that most people are educated in their country of birth. Accordingly, a restriction purportedly based on place of training is effectively a restriction based on national origin, particularly if that restriction is in no way connected to the issue of training. He also states that in the author's 1995 case before the HREOC there was no clear evidence of an oversupply of doctors in the country. Rather, it was the increase in the number of Australian medical graduates coupled with the automatic registration of doctors from the United Kingdom (which existed until recently) which had been the major reasons for the increase in doctors' numbers. It was also emphasized that the principal supply problem was one of geographical distribution of doctors, that the imposition of the quota was motivated by a desire to restrict the number of doctors to control the health expenditures of Commonwealth countries (and protect doctors' incomes) and that the Health Ministers' advisers were advocating immigration quotas, not examination quotas. The only reasonable conclusion to be drawn from the evidence of the Government's own witnesses and reports was that the decision to impose the quota was based not on fact and analysis but on feelings and perceptions.

8.5 The State party asserts that the author has been practising medicine in Australia under temporary registration and that he is subject to strict supervision and practice requirements while working as a practitioner in the public hospital system. This statement is totally untrue. The author has now worked as a doctor for 14 years, 10 of which have been in Australian public hospitals. He is classified as a Senior Hospital Medical Officer Year 5 and in his last position at Maroondah Hospital (a large hospital in Melbourne) he was the Night Senior, i.e. he was in charge of the whole hospital at night. Unfortunately, he is now unable to practise even under temporary registration. The Medical Board of Victoria, following advice from the Australian Medical Council regarding his examination results, has placed such tight restrictions on this registration that it has made him unemployable.

8.6 The State party asserts that the United States, Canada, the United Kingdom and New Zealand have similar examination systems to Australia. It does not say, however, that while the United States and Canada have an initial evaluating examination for overseas-trained doctors, the licensing examination is the same for both overseas-trained and locally-trained doctors. Thus, there is not a differential system allowing differential standards and open to abuse, as is the case in Australia.

8.7 Counsel further states that the right to work must embrace the right to be fairly assessed to work in the occupation for which a person is qualified and not to be denied that right by reasons of a capricious assessment system or quota.

Issues and proceedings before the Committee

9.1 In accordance with rule 94, paragraph 6, of its rules of procedure, the Committee reconsidered the question of admissibility in the light of the observations made by the State party with respect to the Committee's decision of 19 August 1997 that declared the communication admissible. The Committee, however, did not find reasons to revoke its previous decision, since the State party's observations as well as the author's comments thereon referred mainly to the substance of the matter. In the circumstances, the Committee proceeded with the examination of the merits.

9.2 The main issue before the Committee is whether the examination and the quota system for overseas-trained doctors respect the author's right, under article 5 (e) (i) of the Convention, to work and to free choice of employment. The Committee notes in this respect that all overseas-trained doctors are subjected to the same quota system and are required to sit the same written and clinical examinations, irrespective of their race or national origin. Furthermore, on the basis of the information provided by the author it is not possible to reach the conclusion that the system works to the detriment of persons of a particular race or national origin. Even if the system favours doctors trained in Australian and New Zealand medical schools such an effect would not necessarily constitute discrimination on the basis of race or national origin since, according to the information provided, medical students in Australia do not share a single national origin.

9.3 In the Committee's view, there is no evidence to support the author's argument that he has been penalized in the clinical examination for having complained to the HREOC, in view of the fact that an independent observer, appointed by him, was present during two of his attempts.

10. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of article 5 (e) (i) or any other provision of the Convention.

11.1 Pursuant to article 14, paragraph 7 (b), of the Convention, the Committee recommends that the State party take all necessary measures and give transparency to the procedure and curriculum established and conducted by the Australian Medical Council, so that the system is in no way discriminatory towards foreign candidates irrespective of their race or national or ethnic origin.

11.2 After considering several complaints concerning Australia under article 14 of the Convention, the Committee also recommends to the State party that every effort be made to avoid any delay in the consideration of all complaints by the Human Rights and Equal Opportunity Commission.

G. Communication No. 10/1997

Submitted by: Ziad Ben Ahmed Habassi [represented by counsel]

Alleged victim: The author

State party concerned: Denmark

Date of communication: 21 March 1997 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 17 March 1999,

Having concluded its consideration of communication No. 10/1997, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1. The author of the communication is Ziad Ben Ahmed Habassi, a Tunisian citizen born in 1972 currently residing in Århus, Denmark. He claims to be a victim of violation by Denmark of article 2, paragraph 1 (d), and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel.

The facts as presented by the author

2.1 On 17 May 1996 the author visited the shop "Scandinavian Car Styling" to purchase an alarm set for his car. When he inquired about procedures for obtaining a loan he was informed that "Scandinavian Car Styling" cooperated with Sparbank Vest, a local bank, and was given a loan application form which he completed and returned immediately to the shop. The application form included, inter alia, a standard provision according to which the person applying for the loan declared himself or herself to be a Danish citizen. The author, who had a permanent residence permit in Denmark and was married to a Danish citizen, signed the form in spite of this provision.

2.2 Subsequently, Sparbank Vest informed the author that it would approve the loan only if he could produce a Danish passport or if his wife was indicated as applicant. The author was also informed that it was the general policy of the bank not to approve loans to non-Danish citizens.

2.3 The author contacted the Documentary and Advisory Center for Racial Discrimination (DRC) in Copenhagen, an independent institution which had been in contact with Sparbank Vest on previous occasions about the bank's loan policy vis-à-vis foreigners. In a letter dated 10 January 1996 the DRC had requested Sparbank Vest to indicate the reasons for a loan policy requiring applicants to declare that they were Danish citizens. Sparbank Vest had informed the DRC, by letter of 3 March 1996, that the requirement of citizenship mentioned in the application form was to be understood merely as a requirement of permanent residence in Denmark. Later, the DRC requested information from the bank about the number of foreigners who had actually obtained loans. On 9 April 1996 Sparbank Vest informed the DRC that the bank did not register whether a customer was a Danish citizen or not and therefore it was not in a position to provide the information requested. It also said that in cases of foreign applicants the bank made an evaluation taking into account whether the connection to Denmark had a temporary character. In the bank's experience, only by a permanent and stable connection to the country was it possible to provide the necessary service and ensure stable communication with the customer.

2.4 On 23 May 1996 the DRC reported the incident concerning the author to the police department in Skive on behalf of the author, alleging that the bank had violated the Danish Act on the prohibition of differential treatment on the basis of race. The DRC enclosed copies of its previous correspondence with Sparbank Vest. By letter dated 12 August 1996 the police informed the DRC that the investigation had been discontinued given the lack of evidence that an unlawful act had been committed. The letter indicated that the requirement of Danish citizenship had to be considered in connection with the possibility of enforcement and that the bank had given assurances that the provision would be deleted when printing new application forms.

2.5 On 21 August 1996 the DRC lodged a complaint with the State Prosecutor in Viborg, challenging the decision of the police department to consider the citizenship criterion legitimate. The author had a clear permanent connection to Denmark in view of the fact that he was married to a Danish citizen and had a regular job. The fact that the bank still insisted on documentation with regard to Danish citizenship constituted a discriminatory act which could not be justified by the bank's interest in enforcing its claim. The DRC also emphasized the fact that Sparbank Vest had not provided any information regarding foreign customers, despite the fact that such information was relevant to determine whether or not the loan policy was discriminatory. By letter dated 6 November 1996 the State Prosecutor informed the DRC that he did not see any reason to overrule the police decision.

2.6 The author indicates that the decision of the State Prosecutor is final, in accordance with section 101 of the Danish Administration of Justice Act. He also states that questions relating to brining charges against individuals are entirely at the discretion of the police and, therefore, the author has no possibility of bringing the case before a court.

The complaint

3.1 Counsel claims that the facts stated above amount to violations of article 2, paragraph 1 (d), and article 6 of the Convention, according to which alleged cases of discrimination have to be investigated thoroughly by the national authorities. In the present case neither the police department of Skive nor the State Prosecutor examined whether the bank's loan policy constituted indirect discrimination on the basis of national origin and race. In particular, they should have examined the following issues: first, to what extent persons applying for loans were requested to show their passports; second, to what extent Sparbank Vest granted loans to non-Danish citizens; third, to what extent Sparbank Vest granted loans to Danish citizens living abroad.

3.2 Counsel further claims that in cases such as the one under consideration there might be a reasonable justification for permanent residence. However, if loans were actually granted to Danish citizens who did not have their permanent residence in Denmark, the criterion of citizenship would in fact constitute racial discrimination, in accordance with article 1, subparagraph 1, of the Convention. It would be especially relevant for the police to investigate whether an intentional or an unintentional act of discrimination in violation of the Convention had taken place.

State party's submission on admissibility and counsel's comments

4.1 In a submission dated 28 April 1998 the State party notes that according to section 1 (1) of Act No. 626 (Act against Discrimination) any person who, while performing occupational or non-profit activities, refuses to serve a person on the same conditions as others due to that person's race, colour, national or ethnic origin, religion or sexual orientation is liable to a fine or imprisonment. Violation of the Act is subject to public prosecution, i.e. private individuals cannot bring a case before the courts.

4.2 If the prosecutor considers that no offence has been committed, or that it will not be possible to bring evidence sufficient for conviction and, therefore, discontinues the investigation, the injured party still has the possibility of bringing a civil action claiming compensation for pecuniary or non-pecuniary damage. An action claiming compensation for pecuniary damage is not relevant in the present case, since the loan was actually granted with the applicant's wife listed as borrower and the applicant as spouse. It would, however, have been relevant to bring a civil declaratory action against the bank claiming that it acted against the law when it refused the loan application. Such action is recognized in domestic case-law. Accordingly, the State party considers that a civil action is a possible remedy which the applicant should have made use of and that the non-use of this remedy renders the case inadmissible.

4.3 The State party also argues that the author had the possibility of complaining to the Ombudsman of the Danish Parliament about the decision of the prosecutor. The fact that the prosecutors are part of the public administration means that their activities are subject to the Ombudsman's power to investigate whether they pursue unlawful aims, whether they make arbitrary or unreasonable decisions or whether they commit errors or omissions in other ways in the performance of their duties. The result of a complaint to the Ombudsman may be that the police and the prosecutor reopen the investigation.

4.4 The State party also argues that the communication is manifestly ill-founded. Its objections, however, are explained in its assessment of the merits of the case.

5.1 Counsel contends that the State party fails to indicate on which provision of the Danish Act on Tort it bases its claim that civil action can be taken against Sparbank Vest. He assumes that the State party refers to section 26 of the Act. However, to his knowledge, no cases relating to racial discrimination have ever been decided by Danish courts on the basis of that section. Accordingly, there is no evidence in Danish case-law to support the interpretation given by the State party.

5.2 Counsel also contends that a private party may only be liable under section 26 if there is an act which infringes national law. In the present case, however, the relevant bodies within the prosecution system did not find any reason to investigate; it would, therefore, have been very difficult to convince a court that there was any basis for liability on the part of Sparbank Vest. In those circumstances a theoretical remedy based on section 26 of the Danish Act on Tort does not seem to be an effective remedy within the meaning of the Convention.

5.3 With respect to the possibility of filing a complaint with the Ombudsman, counsel argues that such remedy is irrelevant, since the Ombudsman's decisions are not legally binding.

The Committee's admissibility decision

6.1 During its fifty-third session in August 1998 the Committee examined the admissibility of the communication. It duly considered the State party's contention that the author had failed to exhaust domestic remedies but concluded that the civil remedies proposed by the State party could not be considered an adequate avenue of redress. The complaint which was filed first with the police department and subsequently with the State Prosecutor alleged the commission of a criminal offence and sought a conviction under the Danish Act against Discrimination. The same objective could not be achieved by instituting a civil action, which would lead only to compensation for damages.

6.2 At the same time the Committee was not convinced that a civil action would have any prospect of success, given that the State Prosecutor had not considered it pertinent to initiate criminal proceedings regarding the applicant's claim. Nor was there much evidence in the information brought to the attention of the Committee that a complaint before the Ombudsman would result in the case being reopened. Any decision to institute criminal proceedings would still be subject to the discretion of the State Prosecutor. No possibilities would then be left for the complainant to file a case before a court.

6.3 Accordingly, on 17 August 1998, the Committee declared the communication admissible.

The State party's observations on the merits

7.1 The State party submits that Mr. Habassi complained to the police on 28 May 1996. On 12 August 1996 the police interviewed the credit manager of Sparbank Vest in Skive, who was notified of Mr. Habassi's complaint. According to the police report the manager stated that all loan applicants signed the same type of application form and that the Danish Bankers

Association had decided that the phrase "that I am a Danish national" would be deleted when the application forms were reprinted. No further investigative steps were taken. By letter dated 12 August 1996 the Chief Constable in Skive informed the DRC that it had decided to discontinue the investigation, since it could not reasonably be assumed that a criminal offence subject to public prosecution had been committed. The letter also provided details on the possibility of filing an action for damages and enclosed guidelines on how to file a complaint. By letter of the same date the Chief Constable also informed Sparbank Vest that the investigation had been discontinued.

7.2 The State party recalls that on 21 August 1996 the DRC complained about the Chief Constable's decision to the District Public Prosecutor in Viborg. DRC stated in its complaint that it found it worrying that the Chief Constable apparently considered the requirement of nationality motivated by the need to ensure enforcement to be a lawful criterion. Mr. Habassi had a Danish civil registration number and a national register address in Denmark. That in itself ought to have been sufficient to prove his ties with Denmark. In addition, he stated on the loan application that he received a salary and had a Danish spouse. The bank's practice of demanding documentation about nationality was a discriminatory act which could not be justified by considerations of enforcement.

7.3 DRC also stated that for Mr. Habassi it was immaterial whether the refusal of the bank was based on negative attitudes towards ethnic minorities (for instance that they are poor debtors) or on genuine concern on the part of the bank about enforcement. The salient fact was that despite having satisfied all the conditions for being granted a loan, he was required (probably because of his foreign-sounding name) to provide further documentation. It was therefore Mr. Habassi's Middle East background that was the cause of the refusal and not the more formal criterion of nationality. The bank's statement that the requirement of Danish nationality would be removed from the application forms did not alter the fact that Mr. Habassi had been exposed to unlawful differential treatment against which the Danish authorities had a duty to offer protection pursuant to the Convention.

7.4 The State party also recalls that the District Public Prosecutor found no basis for reversing the Chief Constable's decision and argued, in particular, that neither the Act against Discrimination nor the Convention include nationality as an independent ground of discrimination. Against this background it must be assumed that discrimination against foreign nationals only violates the Act to the extent that it could be assimilated to discrimination on the basis of national origin or one of the other grounds listed in section 1 (1). According to the legislative history of the Act, it had to be presumed that certain forms of differential treatment could be considered lawful if they pursued a legitimate aim seen in the light of the purpose of the Act. In the processing of loan applications the applicant's ties with Denmark may be of importance, among other things, for assessing the possibility of enforcement of the creditor's claim. In consideration of this the data concerning the applicant's nationality were objectively justified.

7.5 The State party argues that the police investigation in the present case satisfies the requirement that can be inferred from the Convention and the Committee's practice. According to the Administration of Justice Act the police initiates an investigation when it can be reasonably assumed that a criminal offence subject to public prosecution has been committed.

The purpose of the investigation is to clarify whether the conditions for imposing criminal liability or other criminal sanctions have been fulfilled. The police will reject an information laid if no basis is found for initiating an investigation. If there is no basis for continuing an investigation already initiated, the decision to discontinue it can also be made by the police, provided no provisional charge has been made.

7.6 In the State party's opinion, there is no basis for criticizing the Chief Constable's and the District Public Prosecutor's decisions, which were taken after an investigation had actually been carried out. The police took the information seriously and its decision was not unsubstantiated. The decision was not only based on the information forwarded by the author, including the written correspondence with the bank about its credit policy, but also on interviews with the author and a credit manager of the bank.

7.7 The State party refers to the Committee's opinion regarding communication 4/1991 in which the Committee stated that "when threats of racial violence are made and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition".[1] It argues, however, that the present case is of a different nature and therefore the Committee cannot reasonably set out the same requirements to investigate as in the said opinion. Even if the requirement that it is incumbent on the police to "investigate with due diligence and expedition" were to apply in the present case, where the loan application was actually granted, the State party considers that the requirement was met. Although the information laid did not lead to prosecution, the handling of it by the police did afford the applicant effective protection and remedies within the meaning of article 2, paragraph 1 (d), and article 6 of the Convention.

7.8 The State party further contends that there is no basis either for criticizing the legal assessment made by the prosecutor. It is noted in this connection that not every differentiation of treatment is unlawful discrimination within the meaning of the Convention. In General Recommendation XIV on article 1, paragraph 1, of the Convention the Committee stated that "a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate (...). In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin." The decisions of both the Chief Constable and the District Public Prosecutor show that the decisions were based on the fact that differentiation of treatment that pursues a legitimate aim and respects the requirement of proportionality is not prohibited discrimination.

7.9 Finally, the State party dismisses the author's claims that questions relating to the pursuance by the police of charges against individuals are entirely up to the discretion of the police and that there is no possibility of bringing the case before the Danish courts. Firstly, it is possible to complain to the relevant District Public Prosecutor; secondly, the applicant had the

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[1] L.K. v. The Netherlands, CERD/C/42/4/1991, para. 6.6.

possibility of filing a civil action against the bank; and thirdly, the applicant had the possibility of complaining to the Ombudsman. The effect of such complaint to the Ombudsman may be that the police and the prosecutor reopen the investigation.

Counsel's comments

8.1 Counsel contends that the police interviewed the author but had only a brief telephone conversation with the bank. No detailed investigation, for example about the requirements concerning Danish citizens living abroad, was carried out. The police did not at all examine whether the case amounted to indirect discrimination within the meaning of the Convention. The Committee, however, stressed the duty of States parties to duly investigate reported incidents of racial discrimination in its concluding observations regarding communication 4/1991.

8.2 The State party states that the requirement of Danish citizenship was only to be seen in connection with the assessment of the ties with Denmark of the person applying for a loan in correlation, therefore, with the possibilities of subsequent judicial recovery of the amount of the loan in case of default. Counsel underlines that such reason was not mentioned by the credit manager of Sparbank Vest, as reflected in the police report. The report says that the police assistant E.P. had contacted the credit director of Sparbank Vest who was of the opinion that the bank had not done anything illegal in connection with the loan application in question, since all applicants signed the same type of application form with the formulation "that I am a Danish citizen". The bank did not mention any particular reason for its practice. It did not, in particular, declare that there was a requirement of residence due to the possibility of enforcing claims against debtors. It appears, therefore, that the reason in question had been made up by the police in Skive on their own initiative. Even if the reason came from the bank itself it appears to be highly irrelevant for an evaluation of whether the requirements of the Convention have been met.

8.3 It is clear that Danish citizenship is not a guarantee for subsequent judicial recovery of the defaulted amount if the Danish citizen lives, for example, in Tunisia. The application of a criterion of citizenship for the reason given by the police would indeed be a serious indication that indirect discrimination on grounds prohibited by the Convention had taken place. The possibilities of subsequent judicial recovery would rather justify a criterion of residence. However, with respect to such criterion counsel draws the attention of the Committee to a letter of 6 April 1995 addressed to the DRC in which the Minister of Business Affairs (Erhvervsministeren) expresses the view that a credit policy according to which no credit is granted to persons unless they have lived in Denmark for at least five years would be contrary to the discrimination rules. It is the author's conclusion that the police did not at all attempt to clarify with the bank the real reason behind the requirement of citizenship.

8.4 Counsel states that, according to the State party, the decisions of the Chief Constable and the State Prosecutor were based on the fact that differentiation of treatment that pursues a legitimate aim and respects the requirements of proportionality is not prohibited discrimination. He argues, however, that the authorities did not in fact examine whether a legitimate aim was pursued by the bank and that in cases of alleged discrimination the decision whether or not to initiate proceedings must be taken after a thorough investigation of the alleged cases of discrimination.

Examination of the merits

9.1 The Committee has considered the author's case in the light of all the submissions and documentary evidence produced by the parties, as required under article 14, paragraph 7 (a), of the Convention and rule 95 of its rules of procedure. It bases its findings on the following considerations.

9.2 Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.

9.3 In the present case the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis-à-vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.

9.4 The Committee notes that the author, considering the incident an offence under the Danish Act against Discrimination, reported it to the police. First the police and subsequently the State Prosecutor in Viborg accepted the explanations provided by a representative of the bank and decided not to investigate the case further. In the Committee's opinion, however, the steps taken by the police and the State Prosecutor were insufficient to determine whether or not an act of racial discrimination had taken place.

10. In the circumstances, the Committee is of the view that the author was denied effective remedy within the meaning of article 6 of the Convention in connection with article 2 (d).

11.1 The Committee recommends that the State party take measures to counteract racial discrimination in the loan market.

11.2 The Committee further recommends that the State party provide the applicant with reparation or satisfaction commensurate with any damage he has suffered.

12. Pursuant to rule 95, paragraph 5, of its rules of procedure, the Committee would wish to receive information, as appropriate and in due course, on any relevant measures taken by the State party with respect to the recommendations set out in paragraphs 11.1 and 11.2.

H. Communication No. 16/1999

Submitted by: Kashif Ahmad (represented by legal counsel)

Alleged victim: The author

State party concerned: Denmark

Date of communication: 28 May 1999 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 13 March 2000,

Having concluded its consideration of communication No. 16/1999, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1.1 The author of the communication is Kashif Ahmad, a Danish citizen of Pakistani origin born in 1980 who claims to be a victim of violations by Denmark of article 2, subparagraph 1 (d), and article 6 of the Convention. He is represented by counsel.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 27 August 1999.

The facts as submitted by the author

2.1 On 16 June 1998 family members and friends had come to meet pupils after the exams at the Avedore Gymnasium, Hvidovre, as is the usual practice in Danish high schools. The author and his brother were waiting with a video camera outside an examination room, where a friend of theirs was taking an exam. While they were waiting, a teacher, Mr. K. P., asked them to leave. Since they refused the teacher informed the headmaster, Mr. O.T., who immediately called the police. Mr. O.T. publicly referred to the author and his brother as "a bunch of monkeys". When the author told Mr. O.T. that he was going to complain about the manner in which he had been treated, Mr. K.P. expressed doubts about the effectiveness of such a complaint and said that the

author and his brother were a "bunch of monkeys" who could not express themselves correctly. When the police arrived the author and his friends discussed the matter with them. The police promised to have a discussion with Mr. O.T.

2.2 The same day the author received a letter in which Mr. O.T. informed him that he did not want him to be present at the official celebration to be held at the school on 19 June 1998 in the course of which he was going to receive his diploma. On 17 June 1998 the author's father went to Avedore Gymnasium in order to discuss the matter with Mr. O.T. Mr. O.T. first refused to receive him and when he finally accepted, told him that the matter had been settled and asked him to leave. Subsequently, the author learned from one of the employees at the school that Mr. O.T. had given instructions to the door guards not to let him in.

2.3 By letter dated 25 June 1998, counsel informed Mr. O.T. that the matter was a serious one and that the expressions he had used against the author amounted to a violation of section 266b of the Danish Penal Code. Counsel also requested an explanation and an apology for his client. Mr. O.T. replied that the author and his brother had been noisy outside the examination rooms but he did not deny having used the racist expressions referred to above.

2.4 Counsel filed a complaint with the police of Hvidovre on 7 July 1998. By letter dated 23 September 1998 the police informed him that they had interviewed Mr. O.T. and Mr. K.P. and concluded that the expressions used were outside the scope of section 266b of the Penal Code and that the case would be discontinued in accordance with section 749, subparagraph 2, of the Danish Administration of Justice Act. The letter also said that the expressions used had to be seen in connection with a tense incident. In the opinion of the police, they should not be understood as insulting or degrading in terms of race, colour, national or ethnic origin, since they could also be used towards persons of Danish origin who behaved as the author had.

2.5 By letter dated 1 October 1998 counsel requested the police to have the case brought before the State Attorney. On 30 November 1998 the State Attorney upheld the decision of the police.

2.6 Counsel claims that, in accordance with section 101 of the Administration of Justice Act, a decision by the State Attorney relating to an investigation by the police departments cannot be appealed to other authorities. As questions relating to the pursuance by the police of charges against individuals are entirely up to the discretion of the police, there is no possibility of bringing the case before a court. Furthermore, legal action by the author against Mr. O.T. and Mr. K.P. would not be effective, taking into account that the police of Hvidovre and the State Attorney had rejected the author's complaints.

2.7 Counsel further contends that the High Court of the Eastern Circuit, in a decision of 5 February 1999, held the view that an incident of racial discrimination did not in itself imply a violation of the honour and reputation of a person under section 26 of the Danish Act on Tort. According to counsel the position of the High Court, as a result of that decision, is that racial discrimination carried out politely would not in itself constitute a basis for a claim for compensation.

The complaint

3.1 It is submitted that the case was not examined properly by the national authorities and that the author never obtained an apology or sufficient satisfaction or reparation. As a result the State party has violated its obligations under article 2, subparagraph 1 (d), and article 6 of the Convention.

3.2 Counsel claims that neither the police department of Hvidovre nor the State Attorney examined, in particular, the following issues: (a) had Mr. O.T. and Mr. K.P. said that the author and his brother were "a bunch of monkeys" and that they could not express themselves correctly; (b) had that been used with reference to the Pakistani origin of the author and his brother; (c) had that expression amounted to a discriminatory opinion about the author and his brother. According to counsel, the police limited themselves to interviewing Mr. O.T. and Mr. K.P.; they did not even consider interviewing the author and his brother, or the six witnesses whose names and addresses were known to them.

State party's submission on admissibility and merits

4.1 In a submission dated 29 November 1999 the State party contends that the author has failed to establish a prima facie case for the purpose of admissibility and, accordingly, the communication should be declared inadmissible. The State party does not dispute that the other conditions for admissibility set out in article 14 of the Convention and rule 91 of the Committee's rules of procedure are satisfied. Should the Committee not declare the communication inadmissible on the above ground, the State party submits that there has been no violation of the Convention and that the communication is manifestly ill-founded.

4.2 The State party quotes excerpts from the complaint lodged by counsel with the Chief Constable of Hvidovre on 7 July 1998, the letter addressed by counsel to Avedore High School on 22 June 1998 requesting an explanation of the incident and an apology, and the response from the headmaster. It states that as a result of counsel's complaint the police interviewed Mr. K.P. on 9 September 1998.

4.3 Mr. K.P. explained to the police that the author had previously been a student of his and that there had been disagreements between them, including about the author's grades. On the examination day in question he had been corridor attendant responsible, inter alia, for peace and order. At one point he noticed two individuals in the basement at the door to the sports field and that a cup was jammed into the door to keep it open. He asked the two persons, one of whom was the author's brother, what they were doing there. They answered that they were waiting for the author, who was returning books. Mr. K.P. said that it was a strange place to be standing and that there had previously been three cases of theft at the school where that particular door had been used. The two young people started getting excited and shouted at Mr. K.P. The author, who was standing at the book return desk, turned round and insulted Mr. K.P.

4.4 Later, Mr. K.P. noticed four to six persons of foreign origin, including the author and his brother, waiting outside an examination room. There was much noise in the corridor and several times the teachers had come out of the examination rooms and requested quiet. Mr. K.P. then decided to empty the corridors. Everybody left except the group containing the author and his

brother. The brother shouted that they were not going to leave. Mr. K.P. asked them four times, quietly and peacefully, to leave the corridor but they still refused to do so. Both the author and his brother had threatening, piercing eyes, pointed with their fingers at Mr. K.P. and shouted and screamed. Mr. K.P. pressed the intercommunication system on the wall and shortly afterwards the headmaster arrived. The headmaster tried for about five minutes to talk to the group but they still refused to leave. The group, mainly led by the brother and, to some extent, the author, hurled insults and became more and more threatening, even in the presence of other teachers. As a result, the police was summoned. Mr. K.P. could not remember whether the group left by themselves after realizing that the police had been called or whether the police removed them. In any case, he noted subsequently that police were standing outside the school talking with the group. Mr. K.P. was asked whether the headmaster had said anything about "monkeys" to the group. He replied that he had heard nothing of the sort. He was asked whether he had said anything similar. He answered that he did not think so but was not able to reply definitively. If he had said something about "monkeys", it had nothing to do with race, religion, ethnic origin, etc. of the group, but had merely been used as an ordinary slang word for a "bunch" that behaved abnormally. He and Mr. O.T. had not wanted to lodge a complaint with the police about the threats received, as they were used to cultural differences and different conduct.

4.5 On 18 September 1998 the police interviewed Mr. O.T., the headmaster. He explained, inter alia, that Mr. K.P. had come to him and said that he was unable to control events on the second floor as a group of foreigners would not comply with his instructions. Upon arriving on the scene he noticed that a group of foreigners consisting of 8 to 10 persons, including the author and some of his classmates, were making a lot of noise. When he asked them to leave the author's brother started to shout, insulted him and made threatening gestures. While all this was happening the author was standing with a video camera. Mr. O.T. believes that he was recording. A group of parents who had been sitting at the end of the corridor had been very shocked. During the entire episode several adults had come to the corridor and watched the whole scene with astonishment. When asked why he did not file a complaint, Mr. O.T. explained that they were used to many different nationalities at the school and consequently they probably had a higher tolerance threshold. As for the use of the expression "bunch of monkeys", he said that he could not deny having said something like that. If so, the word "monkey" was merely used in the light of the conduct of the group and had no relation to the religious affiliation, colour, ethnic origin, etc. of the group. He could equally have used the word about a group of ethnic Danes behaving similarly. He could not remember Mr. K.P. referring to the group as "a bunch of monkeys who could not express themselves grammatically correctly".

4.6 By letter dated 23 September 1998 the Chief Constable of Hvidovre informed counsel, inter alia, of the following:

> "Pursuant to section 742(2) of the Administration of Justice Act (retsplejeloven), the police initiates an investigation on the basis of an information when it can reasonably be assumed that a criminal offence subject to public prosecution has been committed.
>
> "I have had some investigation made in the case, inter alia by interviewing Mr. O.T. and Mr. K.P.

"Subsequently, I am of the opinion that the statements and the circumstances under which they may have been made fall outside the provisions of section 266b of the Criminal Code.

"I have therefore decided, pursuant to section 749(2) of the Administration of Justice Act, to discontinue the investigation and shelve the case.

"In my assessment I have attached importance to the following:

"Mr. O.T. does not entirely deny that he may have said something like the quoted statement.

"However, the statements must be seen in connection with a tense episode in the corridors of the High School, during which both Mr. K.P., the teacher, and especially Mr. O.T., the headmaster, have borne various expressions of disapproval and even had to summon the police to get peace at the examinations rooms.

"Anyway, in my opinion, the alleged statements cannot especially be perceived as insulting or degrading in relation to race, colour, national extraction or ethnic origin, as such statements could be made with the same meaning about others - also of Danish ethnic origin, that exhibit a similar conduct. The statements refer to the nature of the conduct and not to the person.

"Any claim for damages is referred to a civil action."

4.7 By letter of 1 October 1998 counsel appealed the decision to the District Public Prosecutor for Zealand through the Chief Constable of Hvidovre. He stressed, inter alia, that neither the author nor his classmates had been interviewed by the police and that a video recording existed that showed the situation about 30 minutes before the episode occurred, when a very large number of classmates and relatives of a student being examined were in the corridor. The video also showed the situation shortly before the statements in question were made, when only a quite small number of persons were present in the corridor together with Mr. K.P.

4.8 On 6 October 1998 the Chief Constable forwarded the case to the District Public Prosecutor and explained that in view of the context in which the statements in question had been made he had not found it necessary to interview the author. Although he had not seen the video he did not consider it relevant, as it did not concern the episode itself. On 30 November 1998 the District Public Prosecutor informed counsel that he concurred entirely in the assessment made by the Chief Constable and found no basis for reversing his decision.

4.9 The State party submits that the central point in the present communication is the statements allegedly made by Mr. K.P. and Mr. O.T. Those statements, if made, are not an expression of a difference of treatment that constitutes discrimination in violation of article 2 (1) and article 5 (e) (v) of the Convention. It is more relevant to assess the statements in question in relation to article 4 (a) of the Convention, which requires States parties to penalize certain categories of misconduct. To enable Denmark to ratify the Convention, section 266b and other sections of the Danish Criminal Code were amended. Pursuant to section 266b, any person who,

publicly or with the intent of dissemination to a wider circle, makes statements or any other communication by which a group of persons is threatened, insulted or exposed to indignities on the grounds of race, colour, national extraction or ethnic origin, shall be liable to punishment.

4.10 It is a condition that the statements in question be directed at a group on the basis of its race, etc. Statements aimed at a single person must, if they cannot be seen as an expression of insult or persecution of the group to which the person belongs, be assessed pursuant to the general rules of the Criminal Code on invasion of privacy and defamation of character. When assessing whether some statements must be deemed to be in violation of section 266b it is necessary to make a concrete assessment of the substance of the statements, including the context in which they were made. This was done by the Chief Constable and the District Public Prosecutors in deciding to discontinue the investigation. The Government concurs entirely in those assessments and considers that the author has not substantiated or rendered probable that he was the victim of racist statements in violation of the Convention, as they were not aimed at a group because of its race or ethnic origin. Thus, the author has failed to establish a prima facie case for the purpose of admissibility of his communication.

4.11 The State party is aware that the Convention makes certain requirements of the treatment accorded by the authorities to information from private individuals concerning alleged racial discrimination contrary to the Convention.[1] However, the investigation performed by the police fully satisfied the requirements that can be inferred from the Convention as interpreted in the Committee's practice. The police had details on the substance of the alleged statements both from the author and his counsel and from the teacher and the headmaster. The author has specifically pointed out that the police should have assessed whether the statements that gave rise to the complaint had in fact been made. The State party argues that both the police and the Public Prosecutor assessed that it was not necessary to decide definitively whether the statements were in fact made as, even if they had been made, they were not criminal pursuant to section 266b.

4.12 The task of the police in its treatment of a complaint differs from the way a criminal case is treated by the courts. The task of the police is not to establish in a binding manner what actually happened, but to assess "whether the conditions of imposing criminal liability ... are satisfied..." (section 743 of the Administration of Justice Act). The police have determined that, to be able to make this assessment, it was not necessary to decide whether the alleged statements had in fact been made, as whether they had been made or not, they were not criminal.

4.13 Moreover, the author has pointed out that the police should have determined whether the expressions used were intended to disparage the national origin of the author and whether they were racially discriminatory. According to the State party, such a determination was indeed made, as reflected in the decisions of the Chief Constable and the District Public Prosecutor.

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[1] See opinions adopted by the Committee in L.K. v. the Netherlands (CERD/C/42/D/4/1991), Yilmaz-Dogan v. the Netherlands (CERD/C/36/D/1/1984) and Habassi v. Denmark (CERD/C/54/D/10/1997).

4.14 The author has further pointed out that he, his brother and six named witnesses were not interviewed by the police. The State party argues that the statements, if they had been made, could not be considered as falling within section 266b of the Criminal Code. This made it unnecessary to interview the applicant, who had given an account of his understanding of the incident in his written information. Against this background, the State party considers that it was equally unnecessary to interview the applicant's brother and the six witnesses.

4.15 The State party finds that the police did initiate a proper investigation. Thus, article 2 (l) (d), article 5 (e) (v) and article 6 of the Convention have not been violated, nor has article 4 (a).

Counsel's comments

5. In a submission dated 10 January 2000 counsel argues that the State party recognizes in its response some of the essential elements which gave rise to the report by the author to the police. In previous cases the Committee has stressed the need for a thorough investigation of reported cases of racial discrimination. As explained in the initial submission, the police declined to examine the case after having interviewed only the two representatives of the high school. In order to fulfil the requirements of a thorough investigation, and in order to verify whether the questions relating to the expressions used and their status under Danish law, the police should at least have interviewed the author and/or the witnesses.

Issues and proceedings before the Committee

6.1 The State party submits that Mr. K. P. did not deny having called the author and his group "monkeys". It also submits that Mr. O.T. did not deny having said something similar. It is also established that these utterances were made in the course of a tense episode in a school corridor and in the presence of several witnesses. Thus, the Committee is of the opinion that the author was insulted in public, at least by Mr. O.T.

6.2 The District Public Prosecutor did not establish whether the author had been insulted on the grounds of his national or ethnic origin, in violation of the provision of article 2, paragraph l (d), of the Convention. It is the opinion of the Committee that if the police involved in the case had not discontinued their investigations, it might have been established whether the author had indeed been insulted on racial grounds.

6.3 From information submitted by the State party in its fourteenth periodic report (CERD/C/362/Add.l), the Committee gathers that on several occasions persons have been convicted by Danish courts for breaches of section 266b of the Criminal Code for insulting or degrading statements similar to the ones uttered in the present case. Therefore, the Committee does not share the opinion of the State party that the statements in question do not fall within section 266b of the Criminal Code.

6.4 Owing to the failure of the police to continue their investigations, and the final decision of the Public Prosecutor against which there was no right of appeal, the author was denied any

opportunity to establish whether his rights under the Convention had been violated. From this it follows that the author has been denied effective protection against racial discrimination and remedies attendant thereupon by the State party.

7. The Committee considers that the author has established a prima facie case for the purpose of admissibility. It also considers that the conditions for admissibility have been satisfied. It therefore decides, under rule 91 of its rules of procedure, that the communication is admissible.

8. As for the merits, the Committee considers that, in the light of the above findings, the facts as presented constitute a violation of article 6 of the Convention.

9. The Committee recommends to that the State party to ensure that the police and the public prosecutors properly investigate accusations and complaints related to acts of racial discrimination which should be punishable by law according to article 4 of the Convention.

I. Communication No. 17/1999

Submitted by: B.J. (represented by legal counsel)

Alleged victim: The author

State party concerned: Denmark

Date of communication: 13 July 1999 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 17 March 2000,

Having concluded its consideration of communication No. 17/1999, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

Opinion

1.1 The author of the communication is Mr. B.J., a Danish engineer of Iranian origin born in 1965 who claims to be a victim of violations by Denmark of article 2, subparagraph 1 (a), (b) and (d), article 5 (f) and article 6 of the Convention. He is represented by counsel.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 27 August 1999.

The facts as submitted by the author

2.1 The author has lived in Denmark since 1984 and has Danish nationality. On 1 February 1997 he went to a discotheque in Odense with his brother and a group of friends. Two of them were of Danish origin and four were not. The doorman of the discotheque, Mr. M.R.S., refused to let them in. When the author asked the reason Mr. M.R.S. replied that it was because they were "foreigners".

2.2 On 2 February 1997 the author reported the matter to the police, complaining of racial discrimination. The police assistant on duty was unwilling to accept the complaint and informed the author that the admissions policy was entirely up to the owners of the discotheque.

2.3 On 3 February 1997 the author filed a written complaint that was rejected by the police. He then appealed to the State Attorney who decided to initiate an investigation. Subsequently, the Public Prosecutor brought the case before the District Court of Odense. By decision of 20 March 1998 the Court ruled that Mr. M.R.S. was to be fined DKr 1,000 for violation of section 1, subparagraph 2, of Consolidated Act No. 626 of 29 September 1987 on racial discrimination.

2.4 The author had also requested the Public Prosecutor to file a claim for compensation in accordance with section 26 of the Act on Civil Liability. In that respect the court decided that the violation to which the author had been subjected was not of such a grave or humiliating character as to justify the granting of pecuniary compensation. Accordingly, the claim was rejected.

2.5 The author did not receive a copy of the court's judgement until the time-limit for filing an appeal to the High Court had expired. With the assistance of the Documentary and Advisory Centre on Racial Discrimination (DRC) he obtained a special permit from the High Court of the Eastern Circuit to bring the case before it. However, the High Court did not find any basis for a claim of compensation. According to its judgement, the doorman had informed the author and his friends that they could not enter the discotheque because, in accordance with the discotheque's rules, there were already more than ten foreigners inside. That information was first given to the author's brother and then to the author himself in a polite manner. In the circumstances the High Court concluded that the violation of the author's honour committed by the doorman was not of such severity and did not involve such humiliation as to justify the granting of compensation under section 26 of the Act on Civil Liability. The Court made reference to the fact that the doorman had been fined for rejecting the author and that, accordingly, the necessary verification and condemnation of the act had taken place and the author had had sufficient satisfaction.

2.6 Judgements of the High Court in appeal cases may normally not be appealed to the Supreme Court. However, the Procesbevillingsnaevn may grant a special permit if the case involves issues of principle. On 4 March 1999 the author's counsel applied to the Procesbevillingsnaevn for such a permit, arguing that Danish courts had never before had the possibility to interpret section 26 of the Act on Civil Liability in the light of article 6 of the Convention. The application, however, was rejected by letter of 11 May 1999 and was not brought before the Supreme Court. No further remedies are available under Danish law.

The complaint

3.1 According to counsel, it is undisputed that the author's exclusion from the discotheque was an act of racial discrimination. Article 6 of the Convention stipulates that effective satisfaction and reparation must be granted for any damage suffered as a result of discrimination. However, the purely symbolic fine imposed by the Odense court does not provide effective satisfaction or reparation in accordance with that provision. Furthermore, under section 26 of the Danish Act on Civil Liability it is possible to grant compensation for insult. By refusing such compensation the Danish courts have failed to apply Danish law.

3.2 Counsel further claims that by refusing the author's right to compensation the Danish courts have not fulfilled their obligations under article 2, subparagraph 1 (a), (b) and (d), of the Convention. He finally claims that by allowing the discotheque to refuse the author access on racial grounds the State party has not fulfilled its obligations under article 5 (f) of the Convention.

State party's observations

4.1 In a submission dated 29 November 1999 the State party recognizes that the conditions for admissibility of the communication are satisfied. However, it claims that no violation of the Convention has occurred and that the communication is manifestly ill-founded.

4.2 The State party recalls that by indictment of 3 June 1997, the Chief Constable of Odense charged the doorman in question with violation of section 1 (2), of the Act Prohibiting Discrimination on the basis of Race (Consolidated Act No. 626 of 29 September 1987), because on 2 February 1997 he refused the author admittance on the basis of the latter's colour and ethnic origin. On 20 March 1998 the District Court of Odense found the doorman guilty of the charge. Upon counsel's request, the prosecutor claimed that the doorman should pay compensation for non-pecuniary damage to the author, in accordance with section 26 of the Act on Liability in Damages *(erstatningsansvarsloven)* and article 6 of the Convention. However, the claim for compensation was dismissed by the District Court. The author filed an appeal with the Eastern High Court claiming that the offender should be ordered to pay compensation for non-pecuniary damage of DKr 10,000 with the addition of pre-judgement interest. However, the Eastern High Court upheld the judgement of the District Court.

4.3 In connection with the alleged violation of article 2 (1) (a), (b) and (d) of the Convention, the State party argues that article 2 (1) (d) is the most relevant provision, as article 2 (1) (a) and (b) do not make any independent contribution in relation to the author's complaint, which concerns discrimination committed by a private individual. The adoption of Consolidated Act No. 626 of 29 June 1987 prohibiting discrimination on the basis of race is to be seen, inter alia, as fulfilment of the obligations following from article 2 (l) (d), 5 (f) and 6 of the Convention. Not only has the State party adopted law that criminalizes acts of racial discrimination such as that of which the applicant was a victim on 2 February 1997, but Danish authorities have enforced these criminal provisions in the specific case by prosecuting and penalizing the doorman.

4.4 Concerning the author's claim that the purely symbolic nature of the fine does not provide effective satisfaction or reparation, the State party claims that the Convention cannot be interpreted to mean that it requires a specific form of penalty (such as imprisonment or a fine) or a specific severity or length (such as a non-suspended custodial penalty, a suspended custodial penalty, a fine of a specific amount or the like) as the sanction for specific types of acts of racial discrimination. In the State party's view, it is not possible to infer a requirement of a penalty of a specific type or severity from the wording of the Convention, the practice of the Committee in its consideration of communications under article 14, or from the general recommendations adopted by the Committee.

4.5 Violations of section 1 of the Act prohibiting discrimination on the basis of race are punished with "a fine, lenient imprisonment or imprisonment for a term not exceeding six months". In determining the penalty within the maximum penalty provided for by the provision, the court in question must take into account a multiplicity of elements. It thus follows from section 80 (1) of the Danish Criminal Code that, in determining the penalty, account shall be taken of the gravity of the offence and information concerning the offender's character, including his general personal and social circumstances, his conduct before and after the offence and his motives in committing it.

4.6 Determination of suitable sanctions in specific cases falls within the margin of appreciation of the State party. The national authorities have the benefit of direct contact with all the persons concerned and are better able to assess what is a suitable sanction in the specific case. Moreover, it must be up to the State party to decide what sanction must be deemed sufficiently deterrent and punitive. It is recognized, however, that the margin of appreciation should not be exercised in a manner which would impair the very essence of article 6 of the Convention.

4.7 The penalty imposed on the doorman in the present case accords with domestic case law in similar cases and can be compared with the sanctions in criminal cases concerning racist statements falling within section 266b of the Criminal Code.[1] It can therefore not be considered a fine of a "purely symbolic nature".

4.8 In view of the foregoing, the State party is of the opinion that there is no basis for alleging that article 2 (l) (d), article 5 (f) or article 6 of the Convention has been violated by the conduct of the criminal proceedings against the doorman, as the judgement established that the author had been the victim of a prohibited act of racial discrimination.

4.9 An individual who believes that he or she has been the subject of discrimination in violation of the Act prohibiting discrimination on the basis of race, interpreted in the light of the Convention, can, if relevant, claim compensation for pecuniary or non-pecuniary damage from the offender. However, the State party finds that it must be left to the individual State party to determine the detailed procedural rules and rules of substance for awarding compensation for non-pecuniary damage.

4.10 The right to "adequate reparation or satisfaction" is not an absolute right, but may be subject to limitations. These limitations are permitted by implication since such a right, by its very nature, calls for regulation by the State. In this respect, the States parties enjoy a margin of appreciation and can lay down limitations provided that those limitations do not restrict or reduce the right in such a way or to such extent that its very essence is impaired. In this respect guidance may be found in the jurisprudence of the European Court of Human Rights.

4.11 The State party finds that the last part of article 6 of the Convention is to be interpreted in the same way as article 5 (5) of the European Convention for the Protection of Human Rights

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[1] The State party refers to several cases which are also mentioned in the fourteenth periodic report of Denmark before CERD.

and Fundamental Freedoms. It appears from the latter that everyone who has been the victim of arrest or detention in contravention of its provisions "shall have an enforceable right to compensation". In the interpretation of this provision the European Court has established that the provision does not involve an unconditional right to compensation, as the Contracting States have a right to demand that certain conditions be satisfied. Thus, the Court has stated that the said provision "does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of article 5 (5) ... there can be no question of 'compensation' where there is no pecuniary or non-pecuniary damage to compensate"[1].

4.12 It is thus the opinion of the State party that the Convention cannot be interpreted to mean that a person who has been the subject of an act of discrimination committed by another individual, including an act of discrimination in violation of article 5 (f) of the Convention, always has a claim for compensation for non-pecuniary damage. The fact that a person who has committed such an act is actually prosecuted and convicted can in certain cases constitute in itself "adequate reparation or satisfaction". This view is supported, inter alia, by the interpretative statement concerning article 6 of the Convention deposited by the United Kingdom when signing the Convention. The statement in question says: "The United Kingdom interprets the requirement in article 6 concerning 'reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets 'satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end".

4.13 According to Danish law, it is possible both in law and in fact to be awarded compensation for pecuniary and non-pecuniary damage in case of acts of racial discrimination committed by individuals in violation of the Convention, but this presupposes that the conditions therefor are otherwise satisfied.

4.14 Pursuant to section 26 (1) of the Act on Liability in Damages, a person who is responsible for unlawful interference with another person's liberty, invasion of his privacy, damage to his self-esteem or character or injury to his person shall pay compensation for the damage to the injured person. The provision is mandatory but the condition is that the unlawful act has inflicted "damage" (in Danish tort) the injured party. Tort in the Danish sense is damage to another person's self-esteem and character, that is, the injured person's perception of his own worth and reputation. The humiliation is what motivates the claim for compensation for non-pecuniary damage. It is inherent in the requirement of "unlawful" damage that it must be culpable and that it must be of some gravity. When determining the compensation, if any, account must be taken of the gravity of the damage, the nature of the act and the circumstances in general.

4.15 The decision of the Eastern High Court refusing compensation to the author for non-pecuniary damage was based on a specific assessment of the circumstances concerning the criminal act. Thus, the Court found that the damage to the author's self-esteem had not been sufficiently grave or humiliating to determine any compensation for non-pecuniary damage.

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[1] Wassink v. the Netherlands, judgement of 27 September 1990.

4.16 The fact that a person who has committed an act of racial discrimination against another individual is actually prosecuted and convicted can in certain cases constitute in itself "adequate reparation or satisfaction". The judgement of the Eastern High Court accords with this view when it states the following: "The Court further refers to the facts that the doorman has been sentenced to a fine in respect of the refusal of admittance, that the requisite determination and condemnation of the act has thus been effected and that this has afforded the applicant sufficient satisfaction".

4.17 It is thus the opinion of the State party in the specific case that the fact that the doorman was sentenced to a fine for his refusal to admit the author to the discotheque in question constitutes "adequate reparation or satisfaction".

Counsel's comments

5.1 In a submission dated 14 January 2000 counsel maintains that no effective remedy has been granted to the author in order to comply with the relevant provisions of the Convention, including article 6. In order to implement the Convention conscientiously the States parties must be under an obligation to ensure its effective observance. Sanctions for breaches of national provisions implementing the Convention must be effective and not only symbolic.

5.2 The State party argues that under Danish law it is possible to be awarded compensation for pecuniary and non-pecuniary damage in case of acts of racial discrimination in violation of the Convention committed by individuals, but this predisposes that the conditions therefor are otherwise satisfied. To counsel's knowledge no such court decisions exist. The present case was the first in which a claim for compensation was examined by a Danish court.

5.3 Furthermore, according to section 26 of the Danish Act on Liability compensation is granted in accordance with other statutory provisions. As no other statutory provisions exist in this field there would be no point in awaiting coming court decisions.

5.4 The decision to refuse compensation implies, as a matter of fact, that no compensation for non-pecuniary damages is granted in cases of racial discrimination if the racial discrimination has taken place "politely". Such a position is not in conformity with the Convention.

Issues and proceedings before the Committee

6.1 As readily recognized by the State party the Committee considers that the conditions for admissibility are satisfied. It therefore decides, under rule 91 of its rules of procedure, that the communication is admissible.

6.2 The Committee considers that the conviction and punishment of the perpetrator of a criminal act and the order to pay economic compensation to the victim are legal sanctions with different functions and purposes. The victim is not necessarily entitled to compensation in addition to the criminal sanction of the perpetrator under all circumstances. However, in accordance with article 6 of the Convention, the victim's claim for compensation has to be

considered in every case, including those cases where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self esteem.

6.3 Being refused access to a place of service intended for the use of the general public solely on the ground of a person's national or ethnic background is a humiliating experience which, in the opinion of the Committee, may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.

7. While the Committee considers that the facts described in the present communication disclose no violation of article 6 of the Convention by the State party, the Committee recommends that the State party take the measures necessary to ensure that the victims of racial discrimination seeking just and adequate reparation or satisfaction in accordance with article 6 of the Convention, including economic compensation, will have their claims considered with due respect for situations where the discrimination has not resulted in any physical damage but humiliation or similar suffering.

II. Decisions declaring communications inadmissible.

A. Communication No. 5/1994

Submitted by: C.P.

Alleged victims: The author and his son, M.P.

State party concerned: Denmark

Date of communication: 13 January 1994 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 15 March 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is C.P., an American citizen of African origin living in Roskilde, Denmark. He submits the communication on his behalf and on behalf of his son, and contends that they have been the victims of racial discrimination by the municipal and police authorities of Roskilde and the Danish judicial system. He does not invoke specific provisions of the International Convention on the Elimination of All Forms of Racial Discrimination.

The facts as submitted by the author

2.1 The author is an African American, who has been residing in Denmark since 1963; he married a Danish citizen in 1963, who later left him and from whom he is now divorced. From 1964 to 1972, he worked for a chemicals company in Roskilde; from 1972 to an unspecified date, he worked for Kodak Inc., as shop steward in a warehouse. In September 1990, he was elected shop steward at the Roskilde Technical School. He contends that starting in October 1990, students of the school began to display signs of racism towards him; the school authorities allegedly did not intervene. Mr. P. claims that a number of students, with the blessing of their teacher, carved a racially offensive inscription and cartoon into a red brick. The inscription ran approximately as follows: "A coal black man hanging from a gallows, with large red lips". Under this was inscribed the word "nigger". This brick and other, similar ones, allegedly were openly displayed in the author's working area. Again, the school authorities failed to intervene and allowed the display to continue.

2.2 On 19 November 1990, the author participated in a meeting of the School Staff Council; at the meeting, he showed two of the bricks and asked the school's support in fighting or suppressing this form of racism. To his surprise, the director of the school criticized him for

raising the issue; no measures were taken to identify the students responsible for the "display". The author adds that after the meeting, the school director, head teacher and technical manager refused to talk to him.

2.3 In January 1991, the author was informed that he was to leave immediately, with 10 minutes' notice only, the area where he had been working since being hired by the school. He attributes this to the hostile and discriminatory attitude of the school superintendent and others towards him. Still in January 1991, the author was asked to carry out certain tasks in the school cafeteria, during student breaks. Here, he allegedly was again confronted with the racist remarks and slogans of the students directed towards him; when he asked the school director to be removed from the area, the latter refused. In May 1991, after what the author refers to as "months of racial harassment", the school director and technical manager dismissed him.

2.4 As to the events concerning his son, the author submits the following: on 20 July 1991, the author's son M., then 15 years old, was stopped on his bicycle at a traffic light by a group of four young men aged 17 and 18, who severely beat him, using, inter alia, beer bottles. M. sustained a number of injuries (nose, front, cheeks and jaw), which have since necessitated numerous plastic surgery interventions; the last such intervention was in 1994. According to the author, all four men had previously made racist slurs and remarks to his son and that, in 1988, they had tried to drown him in a lake in a public park. This previous incident had been reported to the police which did not, according to the author, investigate it but dismissed it as a "boyish joke".

2.5 The author immediately reported the incident of 20 July 1991 to the police. He complains that the police requested to see his residence permit and a copy of his rental agreement instead of swiftly investigating the matter; according to him, the police was reluctant to investigate the incident expeditiously and thoroughly, which allegedly had to do with his colour. Two of his son's assailants were briefly kept in police custody for interrogation; another was remanded in custody for another week.

2.6 The author claims that the court proceedings against his son's aggressors were biased, and that the defendants were allowed to "distort" the evidence in the case. Eventually, one received a suspended prison sentence of 60 days, whereas two others were sentenced to pay 10 daily fines of 50 and 100 Danish kroners (DKr), respectively. According to the author, the outcome of the case was at odds with the medical evidence presented and the doctor's testimony in court. Mr. P. complains about an alleged "judicial cover-up" of the case, noting that the mother of one of the defendants works for the Roskilde District Court. The author's attempts to have the case removed from the docket of the Roskilde District Court and moved to another venue in Copenhagen were unsuccessful. In his initial submission, the author does not state whether he appealed the sentence against his son's aggressors pronounced by the District Court.

2.7 Concerning his dismissal from the Roskilde Technical School, the author notes that he filed a complaint for "racial harassment and unlawful dismissal". This complaint was heard on 8 and 9 April 1992, 11 months after the dismissal; it appears that, initially, the case was to be heard in January 1992. The author asserts that the school director and the technical manager "conspired" to distort and blur all the evidence. The judge dismissed the author's complaint

reasoned judgement of 29 pages, adding that Mr. P. was not entitled to monetary compensation but to have his court and legal fees waived. According to the author, the judge refused to grant leave to a higher tribunal. On 10 June 1992, therefore, the author wrote to the Attorney-General, who advised him to submit the case to the Civil Rights Department. By letter dated 3 February 1993, the Department replied that the deadline for filing an appeal had expired. The author suspects that, since he had told his legal representative that he wanted to appeal, all the parties involved are "conspiring that he [should] not bring a racism case against ... the Danish Government".

2.8 Finally, the author refers to a malpractice suit which he filed against his lawyer. It transpires from his submissions that a panel of lawyers and judges, which included a judge of the Danish Supreme Court, has also dismissed this complaint.

The complaint

3.1 The author complains that he and his son have been victims of racial discrimination on the part of the Roskilde police and judicial authorities, and concludes that the judicial system and legal profession have shown much solidarity in covering up and dismissing his own and his son's case. He contends that there is no domestic law which would protect non-citizens and non-whites from racial harassment and unlawful dismissal in Denmark.

3.2 The author seeks: (a) a ruling under whose terms he is given a new hearing in his suit for unlawful dismissal against the Roskilde Technical School; (b) the Committee's recommendation that the aggressors of his son be re-indicted and prosecuted/tried once again for the offence of 20 July 1991; and (c) a condemnation of the attitude of the police and judicial authorities involved in the case.

The State party's information and observations and the author's comments

4.1 In its submission under rule 92 of the Committee's rules of procedure, the State party divides the complaint into the suit for unlawful dismissal filed by Mr. P. and the criminal proceedings against the presumed aggressors of his son.

4.2 As to the first issue, the State party observes that, in April 1992, the Roskilde Court heard the complaint filed by the author on 19 November 1991 with a request that he be awarded 100,000 DKr for unlawful dismissal, and that it delivered its judgement on 5 May 1992. It notes that the author's claim, based on Section 26 of the Liability for Damages Act, was founded partly on the argument that the Technical School had not taken any measures in connection with the appearance of the bricks with typically racist motives, partly on the claim that the school had remained passive vis-à-vis the author's request to discuss the matter in the Cooperation Committee, partly on the claim that the school had reacted to the author's grievances by transferring him to a post including work as a canteen watchman, and that the school had later dismissed him without any valid reason.

4.3 The State party notes that the Court, in its judgement, found that the author had not submitted the matter involving the display of the bricks to the school authorities until several weeks after Mr. P. had first seen the bricks. This delay, the Court held, contributed significantly

to impeding the investigations into who was responsible for the display. On that ground, it concluded that the mere fact that investigations were slack was not in itself sufficient to hold the school liable for damages.

4.4 The Court, in its judgement, characterized as "very unfortunate" the failure of the school to take up Mr. P.'s complaints for detailed discussion of the incident in the Cooperation Committee when asked to do so, but found that this alone did not give rise to liability for damages. The Court further held that, at the time of Mr. P.'s transfer to another post, his dismissal would have been justified for financial reasons. The Court argued that the school could not be blamed for having tried to keep Mr. P. at work through transfer to another job which, in the judges' opinion, was not "obviously degrading", as claimed by the author.

4.5 The Court further observed that the fact that it did not become known until the examination of witnesses during the court hearing that the principal of the school had indeed had one of the bricks in his possession and had shown them to some of his assistants could not - however unfortunate this might appear - be deemed an unlawful act giving rise to the liability of the school.

4.6 With regard to the issue of exhaustion of domestic remedies by Mr. P., the State party gives the following information:

> Pursuant to Section 368 of the Administration of Justice Act, the author could appeal the judgement of the Roskilde Court to the Eastern Division of the Danish High Court.
>
> Under Section 372 (1), the time allowed for appeal is four weeks from the day the judgement is given. Sections 372 (2) and 399 (2) regulate some exceptions to this rule and allow for appeals even after the expiration of this period.

4.7 By letter of 25 May 1992 addressed to the Ministry of Justice, the author outlined the circumstances which led to the proceedings before the Roskilde Court and its judgement in the case. No information was given in this letter as to when judgement had been given, nor were details given about the nature of the legal action. On 9 June 1992, the Ministry of Justice informed the author that it could not intervene in, or change, decisions handed down by courts of law. In this letter, the Ministry advised the author that he could appeal the judgement to the Eastern Division of the High Court and informed him about the statutory deadlines for the filing of such an appeal.

4.8 On 10 June 1992, the author petitioned the Department of Private Law in the Ministry of Justice for permission to appeal after the expiration of the period allowed for appeal (Section 372 (2) of the Administration of Justice Act). The Department then obtained the documents in the case as well as a statement from the author's lawyer, P.H. In a letter dated 18 September 1992, P.H. stated that he had sent a copy of the judgement of 5 May to the author on 6 May 1992, advising him that, in his opinion, there was not ground for appeal. As the lawyer did not hear from Mr. P., he wrote to him again on 19 May, requesting him to contact him telephonically. According to the lawyer, Mr. P. did not contact him until after the expiration of the appeal deadline, informing him that he indeed did want to appeal the judgement; in this

connection, the author told P.H. that he had not reacted earlier because he had been in the United States. The lawyer then explained the operation of Section 372 of the Administration of Justice Act to him.

4.9 After completing its review of the case, the Department of Private Law refused, by letter dated 3 February 1993, to grant permission to appeal the judgement of the Court of Roskilde to the Eastern Division of the Danish High Court. Against this background, the State party contends that the author's complaint must be declared inadmissible on the ground of non-exhaustion of domestic remedies. It is due to the author's own actions and/or negligence that the judgement of 5 May 1992 was not appealed in time.

4.10 In this context, the State party notes that Mr. P. contacted the Department of Private Law once again on the same matter on 7 January 1994. His letter was interpreted by the Department as a request for reconsideration of the issue. By letter of 16 March 1994, the Department maintained its decision of 3 February 1993. By letter of 7 June 1994 addressed to the Department of Private Law rather than to the Supreme Court of Denmark, the author applied for legal aid for the purpose of filing an application with the Supreme Court, so as to obtain permission for an extraordinary appeal under Section 399 of the Administration of Justice Act. On 9 August 1994, the Department informed him that an application to this effect had to be examined at first instance by the County of Roskilde, where his application had thus been forwarded to.

4.11 With regard to the events of 20 July 1991 involving the author's son, the State party refers to the transcript of the hearing before the Court of Roskilde, which shows that the incident opposing M.P. to three young residents of Roskilde was thoroughly examined, and evidence properly evaluated, by the Court. It notes that during the proceedings, medical certificates were obtained concerning the injuries sustained by M.P. On 25 November 1991 the Chief Constable of Roskilde filed charges against the three offenders, M.M.H., A.A.O. and J.V.B. The case was heard before the Roskilde Court with the assistance of a substitute judge of the City Court of Copenhagen, as one of the accused was the son of a clerk employed by the Roskilde Court. Additionally, there were two lay judges, as the case involved an offence punishable by the loss of liberty (Section 686 (2) of the Administration of Justice Act).

4.12 On 27 January 1992, the Court of Roskilde handed down its judgement in the case. The Chief Constable of Roskilde found the punishment imposed on M.M.H. (60 days' suspended prison sentence) too lenient. He therefore recommended to the public prosecutor for Zealand that the sentence against Mr. H. be appealed to the Eastern Division of the High Court, with a view to having an unconditional prison term imposed on Mr. H. The public prosecutor followed the advice and appealed, and the Eastern Division of the High Court, composed of three professional and three lay judges, heard the case on 3 June 1992. The Court concluded that given the violent nature of Mr. H.'s attack on M.P., an unconditional prison sentence of 40 days should be imposed.

4.13 As regards Mr. P.'s allegations submitted to the Committee on behalf of his son, the State party argues that they are inadmissible, partly because they fall outside the scope of the Convention, partly because they are manifestly ill-founded. It notes that the communication

does not give any details about the nature of the violations of the Convention in relation to the way in which the authorities and tribunals handled the criminal case against the three persons accused of violence against M.P.

4.14 The State party denies that, because of the race and colour of M.P., the courts gave the three offenders a lighter sentence than others would have received for similar use of violence. It points out that no importance whatsoever was attached, in the proceedings either before the Roskilde Court or those before the Eastern Division of the High Court, to this element. It is submitted that on the contrary, both the courts and the police of Roskilde took the case against the three individuals accused of aggressing M.P. very seriously: this appears both from the sentence imposed on Mr. H. and from the fact that he was remanded in custody after the incident, upon order of the Court of Roskilde of 21 July 1991.

4.15 The State party further recalls that the prosecution authorities felt that the sentence of the Court of Roskilde was too lenient with regard to one of the aggressors, which is why this sentence was appealed to the Eastern Division of the High Court, which increased the sentence from 60 days' imprisonment (suspended) to 40 days' unconditional imprisonment. In this connection, it is noted that an unconditional sentence is exactly what the prosecution had called for initially.

4.16 Finally, as regards the question of damages to M.P., the State party notes that in the judgement of 27 January 1992 of the Roskilde Court, he was awarded DKr 3,270, which Mr. H. was required to pay. According to the decision of the Eastern Division of the High Court, of 3 June 1992, Mr. H. had paid this amount by that time. Damages awarded by this sentence covered only pain and suffering, while M.P.'s request that the offenders' liability to pay damages to him should be included in the sentence was referred to the civil courts. Pursuant to Section 993 (2) of the Administration of Justice Act, claims for damages may be brought before the (civil) courts for decision. The State party ignores whether the author's son has in fact instituted (civil) proceedings in this matter.

5.1 In his comments, dated 25 January 1995, the author takes issue with most of the State party's arguments and reiterates that he was denied his civil rights, as were his son's. He again refers to the trial against the three individuals who had aggressed his son as "a farce", and complains that the lawyer assigned to represent his son never told the latter what to expect, or how to prepare himself for the hearing. Mr. P. complains that the judge was biased in allowing the accused to present their version of the incident one after the other without interference from the Court. He dismisses several passages in the judgement as "directly misleading" and complains that a professional judge was allowed to ask his son "subjective questions" and using his answers against him. He further asserts that by concluding that, on the basis of the testimonies heard by the court, it was impossible to say who exactly started the fight, the Court "protect[ed] racist attitudes of the whites" and used a "camouflage excuse to find the accused innocent".

5.2 The author further refers to what he perceives as a miscarriage of justice: what exactly the miscarriage consists in remains difficult to establish, but it would appear that the author objects in particular to the way the judge interrogated his son and allowed the testimony of the accused to stand. The author strongly objects to the decision of the prosecution not to appeal the

sentences against two of the accused. The author sums up the Court's attitude as follows: "I ask how can a judge determine a fair decision without hearing all the evidence or even worse just listening to the criminals explaining unless he wanted to pass a lenient sentence. Which he did. Very unprofessional".

5.3 As to the proceedings concerning the allegedly racist and unlawful dismissal from employment at the Roskilde Technical School, the author reiterates his version of the events and submits that he has "exhausted every possible known means to be heard and appeal [his] case". He contends that the school was not justified in dismissing him out of financial considerations, as it had recently expanded its facilities and could have used the services of a shop steward. He alleges that before the Court, the director of the Technical School committed perjury.

5.4 The author emphatically asserts that the delays in appealing the decision of the Roskilde Court should not be attributed to him. He notes that he had trusted his lawyer to handle the issue of the appeal; contrary to the assertion of the State party and his former representative, he contends that he did contact his lawyer to confirm that he wanted to appeal "at all cost", even though his lawyer had advised him that the chances of succeeding on appeal were slim. He blames his lawyer for having acted evasively at around the time - i.e. during the first days of June 1992 - when the deadline for appealing the decision of the Court of Roskilde was approaching. Furthermore, the author once again, even if indirectly, accuses his representative of malpractice and suspects that the lawyer struck a deal with the judge not to have the venue of the case transferred to the Copenhagen High Court.

5.5 In conclusion, the author contends that the State party's submission is replete with "preposterous inconsistencies" and dismisses most of its observations as "misleading", "incorrect", "untrue" or "direct misleading". It is obvious that he contests the evaluation of evidence made by the Courts in both cases - his action against the Technical School and the criminal case against the aggressors of his son - and is convinced that the cases were dismissed because of racist attitudes of all concerned vis-à-vis himself and his son. He complains that there is "no affirmative action against racism in Denmark today".

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, determine whether or not it is admissible under the International Convention on the Elimination of All Forms of Racial Discrimination.

6.2 The Committee has noted the arguments of the parties in respect of the issue of exhaustion of domestic remedies concerning Mr. P.'s claim of unlawful dismissal by the Technical School of Roskilde. It recalls that the Court of Roskilde heard the complaint on 19 November 1991 and delivered its reasoned judgement on 5 May 1992; said judgement was notified to the author by his lawyer on 6 May 1992. The author affirms that he did convey to his lawyer in time that he wanted to appeal this judgement, and he blames the lawyer for having acted negligently by failing to file the appeal within statutory deadlines. The Committee notes that the file before it reveals that the author's lawyer was privately retained. In the circumstances, this lawyer's inaction or negligence cannot be attributed to the State party.

Although the State party's judicial authorities did provide the author with relevant information on how to file his appeal in a timely manner, it is questionable whether, given the fact that the author alleged to have been the victim of racial harassment, the authorities have really exhausted all means to ensure that the author could enjoy effectively his rights in accordance with article 6 of the Convention. However, since the author did not provide prima facie evidence that the judicial authorities were tainted by racially discriminatory considerations and since it was the author's own responsibility to pursue the domestic remedies, the Committee concludes that the requirements of article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, are not met.

6.3 As to the part of the author's case relating to the criminal proceedings against the aggressors of his son, the Committee notes that the police took these aggressors into custody after the author had reported the incident of 20 July 1991, and that the Chief Constable of the Roskilde police subsequently requested that they be criminally prosecuted. It also observes that the fact that one of the accused was the son of a Court clerk was duly taken into account, in that the authorities nominated a substitute judge from another venue to sit on the case. Moreover, it must be noted that the Chief Constable of Roskilde recommended, after judgement in the case had been passed, that the sentence against one of the offenders be appealed, with a view to increasing the sentence against Mr. H.; the public prosecutor for Zealand complied with this request, and the Eastern Division of the High Court imposed a term of unconditional imprisonment on Mr. H. After a careful review of available documents in the case of the author's son, the Committee finds that these documents do not substantiate the author's claim that either the police investigation or the judicial proceedings before the Court of Roskilde or the Eastern Division of the High Court were tainted by racially discriminatory considerations. The Committee concludes that no prima facie case of violation of the Convention has been established in respect of this part of the communication, and that, therefore, it is equally inadmissible.

7. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be transmitted to the State party and to the author.

B. Communication No. 7/1995

Submitted by: Paul Barbaro

Alleged victim: The author

State party: Australia

Date of communication: 31 March 1995 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 14 August 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Paul Barbaro, who is of Italian origin and currently resides in Golden Grove, South Australia. He contends that he has been a victim of racial discrimination by Australia, although he does not invoke the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. Australia made the declaration under article 14, paragraph 1, of the Convention on 28 January 1993.

The facts as presented by the author

2.1 On 25 June 1986, the author obtained temporary employment at the Casino of Adelaide, South Australia; he initially worked as a bar porter, and subsequently as an attendant. On 16 April 1987, the Liquor Licensing Commissioner (LLC) of the South Australian Liquor Licensing Commission, which is responsible for supervising the observance of the rules governing the management of the Adelaide Casino, and must ensure that its operations are subject to continued scrutiny, withdrew the author's temporary employment license and refused to approve the author's permanent employment with the Casino. A hearing, during which the LLC questioned the author on a number of points and discussed his concerns, was held on 30 April 1987.

2.2 In September 1993, well over six years later, the author complained to the Australian Human Rights and Equal Opportunities Commission (HREOC), claiming that the Liquor Licensing Commissioner's decision had been unlawful under sections 9 and 15 of Australia's Race Discrimination Act of 1975. He argued, inter alia, that the Liquor Licensing Commissioner had decided against his obtaining a permanent contract because of his and his family's Italian (Calabrian) origin, because some of his relatives were allegedly involved in criminal activities, notably trafficking of illegal drugs, of which he did not know anything. Mr. Barbaro contends that this attitude effectively restricts the possibilities for employment for Italians who are not

themselves criminals but who may have relatives that are. In support of his argument, the author refers to letters of support from Peter Duncan, M.P., who seriously questioned and denounced this perceived practice of "guilt by association".

2.3 The author refers to similar cases in which the ethnic background of applicants for employment in licensed casinos was adduced as a reason for not approving employment. In particular, he refers to the case of Carmine Alvaro, decided by the Supreme Court of South Australia in December 1986, who was refused permanent employment because of his family's involvement in the cultivation and sale of illegal drugs. In this case, the LLC had stated that he had been advised by the police that they had received information that one of the drug families of the area would attempt to place a "plant" at the Casino.

2.4 The HREOC forwarded the author's complaint to the South Australian Attorney-General's Department for comments. The latter informed the HREOC that the "sole reason for refusing [the author's] employment was to ensure the integrity of the Adelaide Casino and public confidence in that institution". Reference was made in this context to a report from the Commissioner of Police, which stated:

> "Paul Barbaro has no convictions in this State. He is a member of a broad family group which, in my opinion, can only be described as a major organized crime group. ... Eighteen members of this group have been convicted of major drug offences. ... The offences are spread across four States of Australia. All are of Italian extraction. All are related by marriage or direct blood lines."

2.5 There were some discrepancies between the author's and the LLC's assertions in respect of the degree of some of the relationships, in particular the relationships established by the marriages of the author's siblings. The author emphasized that he had maintained a certain autonomy from his relatives, and that he did not know personally many of the people listed in the Police Commissioner's report. He also insisted that he knew nothing of his relatives' previous drug-related offences.

2.6 On 30 November 1994, the Racial Discrimination Commissioner of the HREOC rejected the author's claims concerning his unlawful dismissal, having determined that it was the author's perceived or actual relationships with individuals who have criminal records, and not his Italian ethnic origin, which was the basis for the LLC's decision. The Race Discrimination Commissioner stated that "[T]he fact that [he] and [his] family members are of Italian origin or descent is not germane" to the solution of the case.

2.7 On 7 December 1994, the author appealed for review of the Racial Discrimination Commissioner's decision. By decision of 21 March 1995, the President of the HREOC confirmed the decision of the Racial Discrimination Commissioner, holding that there was no evidence that the author's ethnic background had been a factor in the LLC's decision.

The complaint

3. Although the author does not invoke any provision of the Convention, it transpires from his communication that he claims a violation by the State party of articles 1, paragraph 1, and 5 (a) and (e) (i) of the Convention.

State party's submission on the admissibility of the communication and author's comments thereon

4.1 By submission of March 1996, the State party challenges the admissibility of the communication on several grounds. It first supplements the facts as presented by the author. Thus, the State party notes that when obtaining temporary employment in 1986, the author gave the Police Commissioner for South Australia written authorization to release to the LLC particulars of all convictions and other information that the Police Department may have had on him. On 25 June 1986, Mr. Barbaro acknowledged in writing that the granting of temporary employment was subject to all inquiries made concerning his application for approval as a Casino employee being concluded to the satisfaction of the LLC, and that temporary approval could be withdrawn at any time.

4.2 On 30 April 1987, the author, accompanied by his lawyer and two character witnesses, attended a hearing before the LLC, during which the LLC explained his concern that the author had an association with an organized crime group. The author was given an opportunity to comment on the evidence which had been provided to the LLC by the Police Commissioner.

4.3 In relation to the author's complaint before the HREOC, the State party notes that after the dismissal of Mr. Barbaro's complaint by the Race Discrimination Commissioner, the author gave notice of appeal to have the decision reviewed under section 24AA 9 (1) of the Race Discrimination Act (RDA). The President of the HREOC, Sir Ronald Wilson, a former High Court judge, confirmed the decision in accordance with section 24AA 2 (b) (i) of the RDA, holding that there was no evidence that the author's ethnic origin constituted a ground for the alleged discrimination.

4.4 The State party contends that the case is inadmissible as incompatible with the provisions of the Convention, on the basis of rule 91 (c) of the Committee's rules of procedure, as the Committee is said to lack the competence to deal with the communication. In this context, the State party affirms that Australian law and the RDA conform with the provisions of CERD. The RDA was enacted by the Federal Government and implements articles 2 and 5 of the Convention by making racial discrimination unlawful and ensuring equality before the law (sects. 9 and 10). The wording of section 9 closely follows the wording of the definition of racial discrimination in article 1 of the Convention. Section 15 RDA implements the provisions of article 5 CERD in relation to employment. Moreover, the HREOC is a national authority established in 1986 for the purpose of receiving and investigating alleged breaches of the RDA. Members of the HREOC are statutory appointees and as such enjoy a high degree of independence. HREOC investigated the author's case thoroughly and found no evidence of racial discrimination.

4.5 In the light of the above, the State party argues that it would be inappropriate for CERD to effectively review the decision of the HREOC. While it concedes that the issue of whether the decision of the HREOC was arbitrary, amounted to a denial of justice or violated its obligation of impartiality and independence, would fall within the Committee's jurisdiction, it contends that the author did not submit any evidence to this effect. Rather, the evidence contained in the transcript of the hearing before the LLC and the correspondence with the HREOC indicate that the author's claim was considered within the terms both of the RDA and of the Convention.

4.6 The State party further submits that the complaint is inadmissible on the basis of lack of substantiation, arguing that the author did not provide any evidence that his treatment amounted to a "distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which [had] the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights ..." (article 1, paragraph 1, of the Convention). There is said to be no evidence that the author's ethnic or national origin was a factor in the decision of the LLC to refuse a permanent appointment to the author; rather, he was concerned to fulfil his duty to ensure that the operations of the Casino were subject to constant scrutiny and to guarantee public confidence in the Casino's lawful operation and management.

4.7 Finally, the State party claims that the author failed to exhaust available domestic remedies, as required by article 14, paragraph 7 (a), of the Convention, and that he had two available and effective remedies which he should have pursued in relation to his allegation of unfair dismissal. Firstly, it would have been open to the author to challenge the decision of the President of the HREOC in the Federal Court of Australia, pursuant to the Administrative Decisions (Judicial Review) Act of 1977 (ADJR Act). The State party emphasizes that the decision of the HREOC President was reviewable under the ADJR Act: grounds for review are listed in section 5 of the Act - they include that there is no evidence or other material to justify the taking of the decision, and that the adoption of the decision was an improper exercise of power. The State party argues that this review mechanism is both available and effective within the meaning of the Committee's admissibility requirements: thus, pursuant to any application under the ADJR Act, the Court may set aside the impugned decision, refer it back to the first instance for further consideration subject to directions, or declare the rights of the parties.

4.8 According to the State party, the author could also have challenged the LLC's decision in the Supreme Court of South Australia, by seeking judicial review under Rule 98.01 of the South Australian Supreme Court Rules. Under Rule 98.01, the Supreme Court may grant a declaration in the nature of certiorari or mandamus. Under Rule 98.09, the Supreme Court may award damages on a summons for judicial review. It is submitted that an action for judicial review pursuant to Rule 98 was an available remedy in the instant case.

4.9 The State party concedes that the author was not obliged to exhaust local remedies which are ineffective or objectively have no prospect of success. It refers in this context to the decision of the Full Court of the Supreme Court of South Australia in the case of R. v. Seckler ex parte Alvaro ("Alvaro's case"), decided on 23 December 1986. The material facts of that case were similar to the author's: the respondent was the LLC of South Australia, the same person as in the author's case, and the matter at issue was the respondent's refusal to approve the plaintiff's employment. By majority, the Supreme Court of South Australia held that the plaintiff was not entitled to relief. In the State party's opinion, the judicial precedent provided by the decision in

Alvaro's case did not excuse the author from exhausting the remedy available by way of judicial review; it adds that "unlike an established legal doctrine, a single majority judgement in a relatively new area of law does not meet the test of obvious futility required in order to countenance non-exhaustion of an available remedy".

4.10 Still in the same context, the State party rejects as too broad an interpretation the argument that exhaustion of domestic remedies cannot be required if the remedies available probably would not result in a favourable outcome. Therefore, judicial review under Rule 98 of the Supreme Court Rules is said to be both an available and an effective remedy, to which the author did not resort. The State party notes that the author did not file his claim within the six months of the grounds for review first arising (7 November 1987), as is required under Rule 98.06 of the Supreme Court Rules. Thus, while barred from pursuing this remedy now because of the expiration of statutory deadlines, the State party observes that failure to pursue the remedy in a timely manner must be attributed to the author. Reference to the jurisprudence of the Human Rights Committee is made.

5.1 In comments dated 28 April 1996, the author rebuts the State party's arguments and dismisses them as irrelevant to the solution of his case. He questions the credibility of the State party's arguments in the light of the letters of support he received from a Member of Parliament, Mr. Peter Duncan.

5.2 In the author's opinion, the Committee does have competence to deal with the merits of his claims. He contends that the HREOC did not examine his complaint with the requisite procedural fairness. In this context, he notes, without giving further explanations, that the RDA allows complainants to attend a hearing at some designated location to present arguments in support of the complaint, and that this did not occur in his case. The result, he surmises, led to an uninformed decision of the HREOC which was not compatible with the provisions of the Convention.

5.3 The author notes that the President of the HREOC, Sir Ronald Wilson, who dismissed his claim on 21 March 1995, had been a judge in the Supreme Court of South Australia when the decision in Alvaro's case was handed down in December 1986. He now argues that there was a conflict of interest on the part of the President of the HREOC, who had determined the merits of a factually comparable case in the Supreme Court of South Australia before dealing with the author's own case. In the circumstances, the author argues that the decision of the HREOC was tainted by bias and arbitrariness, and that the Committee has competence to deal with his case.

5.4 The author reiterates that there is sufficient evidence to show that his case falls prima facie within the scope of application of article 1, paragraph 1, of the Convention. He argues that "[a]s with normal practices of institutionalized racism a clear and precise reason [for termination of employment] was not given nor required to be given". He further contends that it is difficult to see how the acts of State agents in his case did not amount to a "distinction" within the meaning of the Convention, given the terms of the Police Commissioner's report to the LLC from 1987, where it was explicitly stated that the author was "a member of a broad family group. ... All are of Italian extraction". From this reasoning, the author asserts, it is clear that individuals with his background are precluded from enjoying or exercising their rights on an equal footing with other members of the community. He also refers to a judgement in the case of

Mandala and Anor v. Dowell Lee,[1] where it was held that blatant and obviously discriminatory statements are generally not required when investigating instances of race distinctions, since direct evidence of racial bias is often disguised.

5.5 As to the requirement of exhaustion of domestic remedies, the author observes that the decision handed down by the President of the HREOC on 21 March 1995 and transmitted to him on 24 March 1995 failed to mention any possible further remedies. He notes that the RDA itself is silent on the possibility of judicial review of decisions adopted by the President of the HREOC by the Federal Court of Australia.

5.6 Finally, the author contends that the possibility of judicial review of the decision of the LLC to refuse him permanent employment under the rules of the Supreme Court of South Australia is not realistically open to him. He argues that the judgement of the Supreme Court of South Australia in Alvaro's case does constitute a relevant precedent for the determination of his own case, all the more so since the State party itself acknowledges that Alvaro's case presented many similarities to the author's. If adding the fact that the President of the HREOC who dismissed the author's appeal had previously been involved in the determination of Alvaro's case, the author adds, then the possibility of challenging his decision before the Supreme Court successfully was remote.

6.1 By further submission of 22 July 1996, the State party in turn dismisses as partial or incorrect several of the author's comments. It notes that the author was partial in choosing quotes from the Police Commissioner's report, and that the complete quotes indicate that the operative factor in the LLC's decision concerning Mr. Barbaro's suitability for casino employment was his association with 18 members of his family who had been convicted of major drug-related offences. Ethnicity was only raised by the Police Commissioner as one factor, combined with others such as family association and the type of offences; the author's ethnic background was relevant only insofar as it assisted in defining this cluster of associations.

6.2 The State party concedes that in Australian employment practice, associates of applicants for employment are generally not considered a relevant factor in the determination of suitability for employment. In the instant case, it was relevant because the LLC was not an employer but a statutory officer. His statutory role was to ensure the constant scrutiny of casino operations, a role recognized by the Supreme Court of South Australia in Alvaro's case. In short, the LLC was entrusted with maintenance of the internal and external integrity of the Casino. Like an employer, however, he was subject to the provisions of the RDA of 1975; in the instant case, the State party reiterates that the fact that there were drug offenders in the author's extended family was a proper justification for the LLC's decision.

6.3 The State party agrees in principle with the author's assertion that obvious and blatant expressions of racial discrimination are not required when investigating instances of race distinctions. It notes in this context that prohibition of indirectly discriminatory acts or

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[1] (1983) All ER 1062.

unintentionally discriminatory acts is an established principle of Australian law. However, the State party re-emphasizes that decisions in Mr. Barbaro's case rested on grounds other than race, colour, descent or national or ethnic origin.

6.4 The State party contends that the author's comments raise new allegations about the fairness of the procedures before the HREOC, especially as regards his claim that he was denied due process since he was not afforded an opportunity to attend a hearing to present his complaint. The State party argues that the author did not exhaust domestic remedies in this respect, and that he could have filed an application for judicial review of this allegation under the ADJR. In any event, the State party continues, procedural fairness did not require the personal attendance of Mr. Barbaro to present his complaint. In the case of the HREOC, the grounds for dismissing complaints prior to conciliation are set out in section 24 (2) of the RDA. They are:

(a) If the Race Discrimination Commissioner is satisfied that the discriminatory act is not unlawful by reason of a provision of the RDA;

(b) If the Commissioner is of the opinion that the aggrieved person does not desire ... that the inquiry be made or continued;

(c) If the complaint has been made to the Commission in relation to an act which occurred more than 12 months prior to the filing of the claim;

(d) If the Commissioner is of the opinion that the complaint under consideration is frivolous, vexatious, misconceived or lacking in substance.

In the author's case, the President of the HREOC dismissed the complaint on the basis of section 24 (2) (d) of the RDA.

6.5 The State party dismisses as totally unfounded the author's argument that the decision of the HREOC was biased because of an alleged conflict of interest on the part of the President of the HREOC. The State party points to the long-standing involvement of the President of the HREOC in the legal profession and adds that for someone with the profile and the background of the President of the HREOC, it is indeed likely that he will consider at different times issues which are related in law or in fact. The State party emphasizes that a previous encounter with a similar (factual or legal) issue does not result in a conflict of interest. Further evidence of bias is required, which the author has patently failed to provide.

6.6 As to Mr. Barbaro's contention that he was not informed of the availability of domestic remedies after the HREOC's decision of 21 March 1995, the State party notes that neither the Convention nor the Australian RDA of 1975 impose an obligation to indicate all available appellate mechanisms to a complainant.

6.7 Finally, concerning the letters of support sent to the HREOC on the author's behalf by a Member of Parliament, Mr. Peter Duncan, formerly a parliamentary secretary to the Attorney-General, the State party recalls that Federal Parliamentarians frequently write to the HREOC on behalf of their constituents, advocating the rights of their constituents in their role as

democratically elected representatives. The State party contends that this role must be distinguished from both the investigative role of the independent HREOC and the executive role of the parliamentary secretary to the Attorney-General. In the instant case, it was clear that the M.P. acted on the author's behalf in his representative role. More importantly, the purpose of the letters was to urge a thorough investigation of the author's complaints by the HREOC. Once a final decision in the case had been taken, Mr. Duncan did not write again.

7. During its forty-ninth session in August 1996, the Committee considered the communication but concluded that further information from the State party was required before an informed decision on admissibility could be adopted. Accordingly, the State party was requested to clarify:

(a) Whether the author would have had the opportunity, in the event that complaints under the Administrative Decisions (Judicial Review) Act and pursuant to Rule 98.01 of the Rules of the Supreme Court of South Australia had been dismissed, to appeal further to the Federal Court of Australia, or whether he could have complained directly to the Federal Court of Australia;

(b) Whether the State party consistently does, or does not, inform individuals in the author's situation of the availability of judicial remedies in their cases.

8.1 In reply, the State party notes that Mr. Barbaro would have had the opportunity to appeal to the Federal Court of Australia and subsequently the High Court of Australia in the event that a complaint under the ADJR Act had been dismissed. Under section 8, the Federal Court of Australia has jurisdiction to hear applications under the ADJR Act; applications may be filed in respect of decisions to which the Act applies, and decisions of the President of the HREOC fall within the definition of "decision(s) to which this Act applies" (sect. 3 (1)). The author thus had the right to seek judicial review of the President's decision before a single judge of the Federal Court of Australia on any of the grounds listed in section 5 of the ADJR Act relevant to his case, within 28 days of the decision of the HREOC President. If an application before a single Federal Court judge had been unsuccessful, the author would have had the right to seek leave to appeal to the full Federal Court.

8.2 If unsuccessful in the full Federal Court of Australia application, the author would have been further entitled to seek special leave to appeal to the High Court of Australia under Order 69A of the High Court Rules; criteria for granting special leave to appeal are listed in section 35A of the Federal Judiciary Act 1903. If special leave to appeal were granted, a three-week period from the granting of special leave to appeal would apply for the filing of the notice of appeal.

8.3 The State party further notes that the author would have had an opportunity to appeal to the full court of the Supreme Court of South Australia and thereafter the High Court of Australia if a complaint under Rule 98.01 of the Rules of the Supreme Court of South Australia had been dismissed by a single judge (section 50 of the Supreme Court Act 1935 (South Australia)). Mr. Barbaro would have had to lodge an appeal within 14 days of the single judge's decision. If an appeal to the full court of South Australia had been unsuccessful, Mr. Barbaro could have

sought special leave from the High Court of Australia to appeal against the decision of the full court of the Supreme Court of South Australia pursuant to section 35 of the Federal Judiciary Act 1903.

8.4 The State party reiterates that the Convention does not impose an obligation to indicate all available appeal mechanisms to a complainant. There is no statutory obligation to provide individuals with information about possible judicial remedies under federal or South Australian law; nor is it the practice of the Federal Government or the Government of South Australia to advise individuals about possible appeal rights. There are, however, some obligations to inform individuals of their appeal rights: thus, under the Federal Race Discrimination Act 1975, where the Race Discrimination Commissioner decides not to inquire into an action in respect of which a complaint was filed, he or she must inform the complainant for that decision, of the ratio decidendi and of the complainant's rights to have this decision reviewed by the HREOC President (sect. 24 (3)). In Mr. Barbaro's case, this obligation was met. It is, moreover, the practice of the HREOC to advise verbally any complainant, who has manifested a desire to challenge a decision of the Commission's president, of other avenues of appeal. There is no evidence that the HREOC deviated from this practice in the author's case.

8.5 The State party notes that Mr. Barbaro does not appear to have sought legal advice on appeals and remedies available to him; it adds that it is common knowledge that a system of publicly funded legal aid exists in Australia, as well as a national network of community Legal Centres, including in South Australia. Both Legal Aid and Community Legal Centres would have provided free legal advice about possible appeal mechanisms to individuals in the author's situation. Mr. Barbaro's failure to avail himself of such free legal advice cannot be attributed to the State party; reference is made to the Committee's jurisprudence that it is the author's own responsibility to exhaust domestic remedies.[1]

9.1 In his comments, the author concedes that the Race Discrimination Commissioner informed him of his right of review of her decision under section 24AA (1) of the Race Discrimination Act. He submits, however, that the President of the HREOC did not inform him of the possibilities of any avenues of appeal against his decision communicated to the author on 24 March 1995; he contends that the HREOC President, a former High Court judge, should have informed him of possible remedies. Mr. Barbaro adds that, as a layman, he could not have been aware of any other possible judicial remedies against the decision of the HREOC President.

9.2 The author reaffirms that an application to the Supreme Court of South Australia under Rule 98.01 of the Court's Rules would have been futile, given the Supreme Court's earlier judgement in Alvaro's case.

9.3 Finally, with regard to the State party's reference to the availability of legal advice from Community Legal Centres, Mr. Barbaro submits that "such assistance is only available in extreme situations and ... only if the matter involves an indictable offence".

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[1] See decision on communication No. 5/1994 (C.P. and his son v. Denmark), paragraph 6.2.

Issues and proceedings before the Committee

10.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the case is admissible.

10.2 The State party contends that the author's claims are inadmissible on the basis of failure to substantiate the racially discriminatory nature of the LLC's decision of May 1987. The Committee notes that the author has made specific allegations, notably insofar as they relate to passages in the report of the Police Commissioner of South Australia which had been made available to the LLC, to support his contention that his national and/or ethnic background influenced the decision of the LLC. In the Committee's opinion, the author has sufficiently substantiated, for purposes of admissibility, his claims under article 5 (a) and (e) (i), read together with article 1, paragraph 1, of the Convention.

10.3 The State party has also claimed that the author has failed to exhaust domestic remedies which were both available and effective, since he could have challenged the decision of the President of the HREOC under the Administrative Decisions (Judicial Review) Act, and the decision of the LLC pursuant to Rule 98.01 of the Rules of the Supreme Court of South Australia. The author has replied that he (a) was not informed of the availability of these remedies, and (b) that the precedent established by the judgement in Alvaro's case would have made an appeal to the Supreme Court of South Australia futile.

10.4 The Committee begins by noting that the author was legally represented during the hearing before the LLC on 30 April 1987. It would have been incumbent upon his legal representative to inform him of possible avenues of appeal after the LLC's decision to terminate the author's employment. That the author was not informed of potential judicial remedies by the judicial authorities of South Australia did not absolve him from seeking to pursue avenues of judicial redress; nor can the impossibility to do so now, after expiration of statutory deadlines for the filing of appeals, be attributed to the State party.

10.5 The Committee further does not consider that the judgement of the Supreme Court of South Australia in Alvaro's case was necessarily dispositive of the author's own case. Firstly, the judgement in Alvaro's case was a majority and not a unanimous judgement. Secondly, the judgement was delivered in respect of legal issues which were, as the State party points out, largely uncharted. In the circumstances, the existence of one judgement, albeit on issues similar to those in the author's case, did not absolve Mr. Barbaro from attempting to avail himself of the remedy under Rule 98.01 of the Supreme Court Rules. Finally, even if that recourse had failed, it would have been open to the author to appeal to Federal Court instances. In the circumstances, the Committee concludes that the author has failed to meet the requirements of article 14, paragraph 7 (a), of the Convention.

11. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author.

C. Communication No. 9/1997

Submitted by: D.S.

Alleged victim: The author

State party concerned: Sweden

Date of communication: 15 February 1997

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 17 August 1998,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 15 February 1997) is D.S., a Swedish citizen of Czechoslovak origin, born in 1947, currently residing in Solna, Sweden. She claims to be a victim of violations by Sweden of articles 2, 3, 5 (e) (i) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination.

The facts as submitted by the author

2.1 In April 1995, the National Board of Health and Welfare advertised a vacancy for a post of researcher/project coordinator with the National Board of Health and Welfare (Socialstyrelsen). In the vacancy announcement, the Board looked for applicants who would be able to collect and process material from investigative studies, and follow up, in the field of public health and medical care, the structure, content and quality of medical care in hospitals. The vacancy announcement stipulated that applicants for general research jobs should have a good knowledge of and experience in the subject area and a good knowledge of techniques and measures used to measure, describe, evaluate and judge the efficacy and results of an activity. Another requirement was that applicants should have a basic academic degree, if possible supplemented by further courses in the field of research and evaluation and with experience in the subject area. Other requirements included the ability to cooperate with others, power of initiative and ease of oral and written expression. Proficiency in another language was considered an additional asset.

2.2 One hundred and forty-seven individuals applied for the vacancy, including the author and S.L. On 10 November 1995, the National Board of Health and Welfare decided to appoint S.L. as researcher and project coordinator to the Board; she assumed her duties with effect from 1 October 1995. The author appealed to the Government against this decision, considering that her qualifications were superior to those of S.L., and that she had been refused the post because of her foreign origin.

2.3 On 14 March 1996, the Government annulled the National Board's decision to appoint S.L. to the post and referred the matter back to the Board for reconsideration. The Government's decision was based on the fact that at the time of S.L.'s appointment, the latter had not yet earned an academic degree (although she was studying for one at that time). Therefore, S.L. did not formally satisfy the requirements for the position as specified by the National Board in the vacancy announcement. The National Board's decision in the case was found to be formally incorrect.

2.4 Shortly afterwards, the National Board of Health and Welfare re-advertised the post of researcher to the Board. The vacancy announcement now stipulated that the Board was looking for a person to work on the MARS (Medical Access and Result System) project to assist in the collection and the processing of material from investigations and studies and in the evaluation of the public health and medical care structure. The work would involve contacts with medical experts to draw up catalogues and prepare material for multimedia presentations. As to the qualifications, the announcement now required "a basic academic degree or equivalent, as well as experience in the subject area". Other requirements included the ability to cooperate and work in a team, the power of initiative, and ease of oral and written expression. A good knowledge of English was required.

2.5 A total of 83 individuals applied for the re-advertised post, inter alia, the author and S.L. The National Board of Health and Welfare invited four of them for an interview, including the author and S.L. Their qualifications were assessed thoroughly. On 20 May 1996, the Board decided once again to appoint S.L. as a researcher to the Board. On 6 June 1996, the author filed another appeal with the Government against this decision, claiming that she was better qualified than S.L. and referring to the fact that she had more relevant academic education and greater work experience.

2.6 The National Board of Health and Welfare prepared a detailed opinion to the Government on the issue. In its opinion, it justified the change of criteria in the re-advertisement of the vacancy and emphasized that the selection process had been careful. The Board observed that on the basis of this process, it was concluded that S.L. was deemed to have the best qualifications for the post, including personal suitability; the Board added that S.L. had by then earned an academic degree in behavioural science. The author was considered the least qualified of the four applicants who had been shortlisted.

2.7 On 12 September 1996, the Government rejected the author's appeal, without giving reasons. The author appealed against this decision as well; in January 1997, this appeal was also dismissed, on the ground that the Government had, by its decision of September 1996, finalized the examination of the matter and therefore concluded the proceedings.

The complaint

3.1 The author complains that she has been discriminated against in her search for employment on the basis of her national origin and her status as an immigrant. In that context she claims that:

- Major parts of vacancy announcements of the type she applied for are tailor-made for an individual who is already chosen in advance, usually a Swedish citizen born in the country;

- Qualification requirements are higher for immigrants than they are for Swedes;

- Employers generally discriminate against immigrants in their employment policy, in that they will choose Swedes who in principle are overqualified for a certain job, whereas they will reject immigrants who are overqualified for the same post. During the interviews for the re-advertised post, the author claims, she was told that she was overqualified;

- During the interviews for the vacant post with the National Board of Health and Public Welfare, the interviewers allegedly displayed an openly negative attitude vis-à-vis the author. In fact, the author dismisses the entire interview as "false play".

3.2 The author claims that the only possibility of solving her situation and that of immigrants in Sweden who seek employment in general, would be to take measures of affirmative action, such as establishing quotas for immigrants for high-level posts, so that immigrants with higher education may obtain the possibility to work.

3.3 The author rejects as another sign of discrimination vis-à-vis her as an immigrant that the National Board considered her the least qualified and suitable of the four applicants shortlisted for the re-advertised post. She reiterates that her academic qualifications were far superior to those of S.L. (master's degree as compared with a bachelor's degree).

The State party's observations

4.1 In its submission under rule 92 of the Committee's rules of procedure, the State party challenges the admissibility of the communication.

4.2 The State party notes that the relevant sources of legal protection against ethnic discrimination in Sweden are the Instrument of Government, the Act of Public Employment and the Act against Ethnic Discrimination. The Instrument of Government lays down the basic principle that public power shall be exercised with respect for the equal worth of all (chap. one, sect. 2). Courts, public authorities and other performing functions within the public administration shall observe, in their work, the equality of all before the law and maintain objectivity and impartiality. When deciding on appointments within the State administration, only objective factors such as experience and competence shall be taken into account.

4.3 The Act of Public Employment reiterates the principles laid down in the Instrument of Government to the extent that when making appointments to administrative positions, the guiding factors shall be experience and competence. As a general rule, competence is valued higher than experience. Authorities must also consider objective factors that correspond to objectives of the overall labour market, equal opportunities and social and employment policies. Decisions concerning the filling of vacant posts are excluded from the normal requirement that administrative authorities must provide reasons for their decisions. The rationale for this

exception is concern for the unsuccessful applicant(s), sparing him/her/them the negative evaluation such reasons might imply. Under Section 35 of the Government Agencies and Institutions Ordinance, appeals against the authorities' decisions may be filed with the Government. An appeal against a decision by the National Board of Health and Welfare in matters of employment can also be filed with the Government, under Section 14 of the 1996 Ordinance relating to the National Board of Health and Welfare. There are no further remedies available against the Government's decision.

4.4 Labour disputes may also be tried under the Act against Ethnic Discrimination of 1994, which aims at prohibiting discrimination in working life. Under the Act, ethnic discrimination takes place when a person or group of persons is/are treated unfairly in relation to others, or are in any way subjected to unjust or insulting treatment on the grounds of race, colour, national or ethnic origin or religious belief.

4.5 Pursuant to the terms of the Act, the Government has appointed an Ombudsman against Ethnic Discrimination whose mandate is to ensure that ethnic discrimination does not occur in the labour market or other areas of society. The Ombudsman should assist anyone subjected to ethnic discrimination and help safeguard the applicant's rights. He must make special efforts to prevent job applicants from being subjected to ethnic discrimination (sect. 4). If so directed by the Ombudsman, an employer is required to attend meetings and supply information pertaining to the employer's relations with job applicants and employees. Should the employer fail to comply with the Ombudsman's directives, the latter may levy a fine (sects. 6 and 7).

4.6 This legislation, which applies to the overall labour market, has two major thrusts. The first is the prohibition of discrimination in relation to applicants for vacancies, which is relevant to the present case. The other prohibition of discrimination covers the treatment of employees. The provision which covers the treatment of job applicants provides that any employer must treat all applicants for a post equally and that, when appointing an applicant, he may not subject other applicants to unfair treatment on account of their race, colour, national or ethnic origin or religious belief (sect. 8). This provision applies if the employer chooses someone other than the individual subjected to discrimination. Discriminatory behaviour in the recruitment process is not per se covered by the prohibition, but if, as a result, this behaviour has led to the employment of another person, the employer will be held accountable for his actions. For any treatment to constitute unlawful discrimination, it must have been motivated by differences which are not based on objective criteria. Employment considerations made by the employer must appear to be acceptable and rational to an outsider if it is to be shown that objective reasons motivated the employer's decision. Any employer who violates the prohibition of discrimination is liable to pay damages. Job applicants who are victims of discrimination may be awarded damages, to be paid by the employer.

4.7 Under Section 16 of the Act against Ethnic Discrimination, cases of discrimination in employment will be examined pursuant to the Act on Litigation in Labour Disputes. Disputes shall be handled before the Labour Court, as a court of first and last instance, if they are brought by an employer's organization or an employees' organization, or by the Ombudsman. If the dispute is brought by an individual employer or a job applicant it shall be heard and adjudicated by a District Court. Appeals may be lodged with the Labour Court, which is the final instance.

4.8 The State party submits that the author has failed to exhaust available domestic remedies, as required by article 14, paragraph 7 (a), of the Convention. It contends that contrary to the views apparently held by the author, it is possible to file actions before a court in cases of ethnic discrimination and damages based on ethnic discrimination in working life. Such an action would have been based on article 24 of the Act on Ethnic Discrimination.

4.9 The State party notes that the author does not appear to have had any contact with the office of the Ombudsman against Ethnic Discrimination, although the Ombudsman would be entitled to lodge a case about discrimination and damages on her behalf. Thus, Swedish law provides for effective judicial remedies in the author's situation. It would have been possible for the author to file an action based on non-observance of the Act on Ethnic Discrimination before the courts, and there is nothing to indicate that her complaint would not have been examined properly and thoroughly, in accordance with applicable procedures. For the Government, therefore, the case is inadmissible for failure to exhaust available domestic remedies.

4.10 Regarding the question of legal aid that might be available to persons wishing to file a case with a court, the State party indicates that under the 1972 and 1997 Legal Aid Acts it is possible to give legal aid to any natural person in a legal matter if he or she is deemed to be in need of such assistance and his or her annual income does not exceed a specific limit. In legal aid matters the claimant shall contribute to the cost in proportion to his or her ability. Legal aid may, however, not be given if it is not deemed reasonable having regard to the importance and nature of the matter and the value of the subject being disputed as well as all other circumstances in the case. Such a situation could occur if a petition does not contain reasons for the claim as prescribed by law or if the claim otherwise is deemed to be manifestly unfounded.

Author's comments

5.1 With respect to the requirement of exhaustion of domestic remedies, the author notes that she was not informed about any remedies other than appeals directed to the Government. Thus, the decision of 12 September 1996 informing her of the Government's dismissal of her appeal did not mention the possibility of an appeal to the Labour Court, either with the assistance of a union or that of the office of the Ombudsman. Nor did the Government inform her of this possibility after she appealed the decision of 12 September 1996. The author emphatically asserts that she considered government organs "the last authorities" in her case with respect to appellate remedies. She states that after reading an article in the newspaper on the possibility of appealing to the Labour Court she contacted her Union. The latter, however, would not take up her case.

5.2 According to the author, an appeal for assistance to the Office of the Ombudsman against Ethnic Discrimination would have been futile. She asserts that the Ombudsman himself has never filed any case on behalf of an individual with the Labour Court, and that he himself has voiced serious doubts about the applicability and effectiveness of the Act against Ethnic Discrimination of 1994. She further states that she had applied for assistance from the Ombudsman on several other occasions, without success.

5.3 As to an appeal to a District Court, the author notes that this would not have been an effective remedy either. She states that in 1993 she applied for a job she did not obtain. She brought the case before a District Court claiming discrimination and requested legal aid. The District Court decided that it had no competence to examine decisions on appointments in the labour market and dismissed the case as well as the legal aid request in December 1994. By then the Act against Ethnic Discrimination which, according to the State party, provides job applicants with the possibility of filing cases before district courts, was already in force. The court's decision also indicated that the case had no prospects of success.

5.4 Moreover, the author asserts that an appeal would have incurred financial outlays which she, as an unemployed person, could not afford. In her view, if resort to a tribunal is not free of charge, she has no judicial remedy. Even so, for her, the issue is not how many judicial instances she may appeal to, but whether the existing law against ethnic discrimination may offer her a remedy; in her opinion, it does not.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the current communication is admissible.

6.2 The State party contends that the author's claims are inadmissible for failure to exhaust domestic remedies, since she could have (a) sought the intercession of the Ombudsman against Ethnic Discrimination in her case; and/or (b) challenged the decision not to appoint her to the vacant post in a District Court with a possibility of appeal to the Labour Court. The author has replied that she was never informed about the possibility of the latter avenue and that appeals to the Ombudsman and the courts would in any event have failed, since the applicable legislation is deficient.

6.3 The Committee notes that the author was aware of the possibility of a complaint to the Ombudsman against Ethnic Discrimination; she did not avail herself of this possibility, considering it to be futile, and because of alleged previous negative experiences with his office. She learned about the possibility of filing an action with the Labour Court and started preparations to this effect but desisted, apparently because her trade union did not support her in this endeavour as it did not find merits in her claim. She further considers that there was no real possibility of obtaining redress in a District Court because of a negative experience regarding a previous case that she had filed with a District Court.

6.4 The Committee concludes that, notwithstanding the reservations that the author might have regarding the effectiveness of the current legislation to prevent racial discrimination in the labour market, it was incumbent upon her to pursue the remedies available, including a complaint before a District Court. Mere doubts about the effectiveness of such remedies, or the belief that the resort to them may incur costs, do not absolve a complainant from pursuing them.

6.5 In the light of the above, the Committee considers that the author has failed to meet the requirements of article 14, paragraph 7 (a), of the Convention.

7. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and the author of the communication.